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In the Supreme Court of the United States

OCTOBER TERM, 1989

INDEPENDENCE BLUE CROSS, PENNSYLVANIA BLUE SHIELD, and DAVID S. MARKSON,

Petitioners

v.

U.S. HEALTHCARE, INC., UNITED STATES HEALTH CARE SYSTEMS OF PENNSYLVANIA, INC., and HEALTH MAINTENANCE ORGANIZATION OF NEW JERSEY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES A. YOUNG *
STRADLEY, RONON, STEVENS & YOUNG
2600 One Commerce Square
Philadelphia, PA 19103
(215) 564-8000
Attorney for Petitioner Pennsylvania Blue Shield

JAY H. CALVERT, JR.
J. GORDON COONEY, JR.
ANDREW D. LEIPOLD
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000

PETER BUSCEMI *
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Attorneys for Petitioners Independence Blue Cross and David S. Markson

* Counsel of Record

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether this Court's public figure doctrine, derived from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), applies in a defamation action where the speech in question is part of commercial advertisements that address a matter of public concern.

LIST OF INTERESTED PARTIES

The caption in this matter includes all parties that appeared in the court of appeals. Petitioner Independence Blue Cross was formerly known as Blue Cross of Greater Philadelphia, and appeared before the court of appeals and district court under that name.

Petitioner Independence Blue Cross has no parent companies or non-wholly owned subsidiaries.

Petitioner Pennsylvania Blue Shield has no parent companies; its non-wholly owned subsidiaries are Keystone Health Plan West, Inc.; Keystone Health Plan Central, Inc.; Camp Hill Insurance Company; Health Benefits Management, Inc.; and Healthguard of Lancaster, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Independence Blue Cross, its former president David S. Markson (together, "Blue Cross"), and Pennsylvania Blue Shield ("Blue Shield") respectfully petition for a writ of certiorari to review the judgment and opinion of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-55a) is reported at 898 F.2d 914. The opinion of the district court (App. 56a-64a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1990. A timely petition for rehearing was de-

nied on April 4, 1990. App. 68a-69a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution are reproduced in Appendix G, 114a.

STATEMENT OF THE CASE

This case concerns claims of false advertising between companies that provide health care insurance and health care delivery programs.[1] The allegedly false speech occurred in comparative advertising campaigns, in which the advertisements discussed the strengths and weaknesses of different forms of health care coverage. The court of appeals concluded that this Court's existing First Amendment doctrine is unsuited to this kind of case, and accordingly engaged in its own, admittedly novel, analysis of the constitutional protection that should be extended to the speech in question. Petitioners submit that the court of appeals' departure from this Court's approach in First Amendment cases warrants review here.

Factual Background

Petitioners Blue Cross and Blue Shield are nonprofit corporations that jointly market health insurance coverage in southeastern Pennsylvania. At the time relevant to this petition, Blue Cross and Blue Shield offered their subscribers both "traditional" health insurance coverage and coverage through a preferred provider organization ("PPO"). "Traditional" health insurance pays a subscriber's non-routine medical expenses, such as hospitalization, diagnostic tests, and treatment by a specialist. Those who are covered by traditional health insurance

[1] The parties allege violations of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); they also allege the Pennsylvania torts of commercial disparagement, defamation, and tortious interference with contract.

normally have complete freedom to choose the hospitals and doctors who will treat them. *See* App. 4a.

Unlike traditional coverage, a PPO is a form of managed care. In a PPO program, a subscriber usually is covered for a broader range of services than is covered by traditional insurance, but his choice of health-care providers is more limited. The subscriber is fully insured for services rendered by those health-care providers who are within the particular PPO's "network," and he may select any provider from within the network. In petitioners' PPO, subscribers may elect to receive treatment from providers outside the network, although if they do so they must pay a higher deductible.

Respondent U.S. Healthcare is a publicly held, for-profit health care insurer.[2] U.S. Healthcare offers coverage through the Philadelphia area's largest health maintenance organization ("HMO") plans. HMOs are another form of managed care. An HMO both insures and manages the delivery of covered health care services, which generally include some routine services not covered under traditional insurance. Typically, an HMO subscriber chooses a primary care doctor from the HMO list of contracting physicians. That doctor in turn is given the authority to decide when hospitalization or treatment from a specialist is required. If the subscriber does not receive this authorization from his primary care doctor, or if he receives treatment from a provider who is outside the HMO provider network, the subscriber usually is responsible for the full cost of the services. App. 4a-5a.

In deciding the best method to market the Blue Cross and Blue Shield PPO and traditional health insurance,

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[2] Respondents include U.S. Healthcare, Inc., and its subsidiaries, United States Health Care Systems of Pennsylvania, Inc., and Health Maintenance Organization of New Jersey, Inc. (collectively, "U.S. Healthcare").

it was determined that there would be a great benefit to informing consumers about the differences among the available health insurance systems. A series of advertisements was therefore developed that described to the public the attributes of PPOs and traditional insurance, and contrasted them with those of HMOs.[3] Some of the advertisements, for example, noted that HMOs limit subscribers' freedom to choose their health care provider, while petitioners' PPO offers a greater degree of choice. Another advertisement revealed—for the first time in a popular forum—that HMO physicians have a financial incentive to limit a patient's access to medical specialists and hospitals.[4] Although the information contained in these advertisements was applicable to U.S. Healthcare's HMOs, the advertisements only discussed HMOs generically, and none mentioned U.S. Healthcare by name.

U.S. Healthcare responded in kind. It created its own advertising campaign that was designed to respond to the information set forth in the Blue Cross and Blue Shield advertisements, and to provide its own information to consumers about the benefits of HMO programs. Thus, for example, one of respondents' print advertisements contained an extensive list that compared the features available under U.S. Healthcare's HMO and petitioners' PPO. App. 8a-9a.

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[3] The text of each advertisement (or a transcript of the advertisement's script) is reproduced in Appendix F, 71a-113a. The actual print advertisements are exhibits in the record. For legibility, the text of each such advertisement has been typeset and reprinted here.

[4] Much of the information revealed in the advertisements has been the subject of extensive debate in the scholarly press and before Congress. *See, e.g.*, Senate Special Committee on Aging, 100th Cong., 1st Sess., Minority Staff Report, *Medicare and HMOs: A First Look With Disturbing Findings* (1987); Levinson, *Toward Full Disclosure of Referral Restrictions and Financial Incentives by Prepaid Health Plans*, 317 New Eng. J. Med. 1729 (1987); Reagan, *Physicians As Gatekeepers: A Complex Challenge*, 317 New Eng. J. Med. 1731 (1987).

The District Court Proceedings

In addition to launching its own media campaign, U.S. Healthcare filed this action in the United States District Court for the Eastern District of Pennsylvania. The complaint set forth state law claims for defamation, commercial disparagement, and tortious interference with contract, as well as a federal cause of action under Section 43(a) of the Lanham Act. 15 U.S.C. § 1125(a).[5] The complaint only sought damages; U.S. Healthcare did not seek an injunction or restraining order to prevent further publication of the advertisements. Blue Cross and Blue Shield (but not petitioner David Markson) counterclaimed, alleging the same four causes of action against U.S. Healthcare based on its advertisements. Blue Cross and Blue Shield also asserted a claim for abuse of process. The complaint and counterclaims invoked the district court's "federal question" jurisdiction under 28 U.S.C. § 1331, and asserted pendent jurisdiction over the state law causes of action.

After a lengthy trial and eight days of deliberations, the jury deadlocked on U.S. Healthcare's claims, and eventually determined that Blue Cross and Blue Shield had not shown that they were damaged by U.S. Healthcare's advertisements.[6] After the jury was discharged,

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[5] Section 43(a) of the Lanham Act provides:

> Any person who, on or in connection with any goods or services . . . uses in commerce . . . [any] false or misleading description of fact, or false or misleading representation of fact, which . . . (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

[6] The court of appeals later reversed the judgment against Blue Cross and Blue Shield, and reinstated the counterclaims, on procedural grounds not relevant to the First Amendment issues presented here. App. 10a, 50a, 53a.

petitioners moved for judgment under Fed. R. Civ. P. 50(b) on U.S. Healthcare's claims. The district court granted the motion and entered judgment in favor of Blue Cross and Blue Shield. App. 60a-63a, 65a, 67a.

The district court concluded that because U.S. Healthcare, Blue Cross, and Blue Shield "are public figures in the context of this case" and because the advertisements discussed "issues of public concern," the First Amendment provided the speech with heightened constitutional protection. The court accordingly ruled that to prevail on its claims, U.S. Healthcare would have to: (a) prove that the advertisements were false; (b) satisfy the "actual malice" standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), *i.e.*, prove that petitioners published the advertisements with knowledge of their falsity or reckless disregard for the truth; and (c) prove these elements by clear and convincing evidence. Based on the evidence presented, the court held that these showings had not been made, and it therefore granted judgment for petitioners on U.S. Healthcare's claims.[7] App. 63a, 67a.

The Court of Appeals' Decision

The court of appeals reversed, concluding that the actual malice standard does not apply to this kind of speech.[8] The court began its First Amendment analysis by noting the lack of direct precedent in this area:

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[7] The district court also stated that if the heightened First Amendment protections did not apply, the parties had introduced sufficient evidence on their respective claims to require their submission to a jury. App. 62a.

[8] Although the actual malice standard is commonly associated with defamation cases, both the district court and the court of appeals correctly observed that the application of the standard is not limited to defamation claims. App. 32a-33a, 62a. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). *See also Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967). At no point in its opinion did the court of appeals distinguish among the various causes of action for purposes of its First Amendment discussion.

> We have found no comparable case, and the parties cite none. In what we believe is a matter of first impression, we are presented with the unique circumstance of allegedly defamatory statements made in the context of a comparative advertising campaign.

App. 27a.

The court then set forth its "conceptual framework" for addressing the issue. It noted that although not all speech is of equal constitutional value, it is speech on "matters of public concern" that is "at the heart of the First Amendment's protection." App. 28a (quoting *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758-59 (1985)) (internal quotation marks omitted). The court of appeals acknowledged that this kind of speech needs "breathing space" to ensure that important information is fully disseminated, and that heightened constitutional protection is therefore required. App. 28a-29a.

The court also said that although certain aspects of this protection are unsettled, some "black letter" rules are firmly established. Specifically, when the plaintiff is a public figure and the speech involves a matter of public concern, the court of appeals recognized that the plaintiff must prove by clear and convincing evidence that the defendant's speech was made with actual malice. App. 29a. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).[9]

Despite these principles, the court of appeals concluded that the public figure concept is inapplicable in a com-

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[9] As this Court has explained, some persons "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." *Gertz*, 418 U.S. at 345. More commonly, however, "those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* The two categories of public figures identified by the Court may be called "general purpose" and "limited purpose" public figures.

mercial advertising case. In the court's view, "[t]he express analysis in *Gertz* is not helpful in the context of a comparative advertising war." App. 49a. Accordingly, the court of appeals engaged in its own First Amendment analysis, one that looked to the format and purpose of the speech, rather than the status of the plaintiff, in determining the level of constitutional protection to be afforded.

The court of appeals adopted this approach despite its recognition that the parties in this case would be public figures under the traditional test. App. 48a. The court acknowledged that when a defamation plaintiff has ready access to the media, and when that plaintiff has voluntarily injected himself into a public debate, thereby assuming the risk that he will be the subject of public comment, a finding of public figure status is appropriate. *Id.* at 47a-48a; *see Gertz*, 418 U.S. at 343, 348-49. The court of appeals concluded, however, that although both conditions were met in this case, the parties should not be considered public figures, and the actual malice standard should not apply.

The court of appeals justified its departure from the *Gertz* line of cases on two grounds. First, it held that because the speakers had an economic motive for their speech, the "central thrust" of the speech was not intended to influence the outcome of the public debate in question. App. 49a. Second, because most corporate advertisers have access to the media, and because, in the court's view, "[m]ost products can be linked to a public issue," the court was concerned that all commercial advertising would be insulated by the actual malice standard. *Id.*

For these reasons, the court stressed the format and purpose of the speech rather than the status of the plaintiff. Because the speech in question was part of a commercial advertisement, the court held that it was "commercial speech" and therefore automatically not entitled

to heightened constitutional protection. App. 37a-45a. The court listed four general reasons why commercial speech generally receives less constitutional protection than other kinds of speech: (a) "commercial speech generally makes a different contribution to the exposition of ideas"; (b) commercial speech is less likely to be "chilled" by legal restrictions; (c) those engaged in commercial speech are "uniquely situated" to assess the truthfulness of their speech; and (d) the extension of the actual malice standard to commercial speech would create the risk of "diluting" non-commercial speech. App. 37a-39a.

Although the court of appeals apparently believed that commercial speech generally adds little to the marketplace of ideas, it recognized that "the products advertised here —health care insurance and delivery—are at the center of public debate." App. 45a. The court also acknowledged that "the quality, availability, and cost of health care are among the most important and debated issues of our time" (*id.*); that "the speech here does discuss costs and consequences of competing health insurance and health care delivery programs"; and, that some of the advertisements do implicate "important health care concerns." App. 41a & n.26. In particular, the court cited petitioners' advertisements that disclosed that "HMO primary care physicians have a financial incentive to deny referrals to specialists." *Id.* at 41a n.26.[10] The court concluded, however, that not all the advertisements were equally informative. *Id.* at 41a ("some of the advertisements capable of defamatory meaning here add little information and even fewer ideas to the marketplace of health care thought").

Despite its efforts to distinguish among the advertisements, the court of appeals then proceeded to treat *all* the

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[10] Although the court of appeals suggested in footnote 26 that only one advertisement included this statement about financial incentives, it had recognized earlier that at least four of the challenged publications included this statement. App. 6a-7a. At trial, the statements about financial incentives were perhaps the most vigorously disputed by U.S. Healthcare.

advertisements as less worthy of constitutional protection. App. 45a. The court explained that in light of the parties' financial incentives to market their health care delivery programs, the parties were unlikely to be chilled from further advertising. *Id.* at 39a-40a. The court also asserted that the advertisements were "readily objectifiable" and "unusually vertifiable" before they were run. *Id.* at 40a-41a. Accordingly, the court ruled that all of the speech in question was commercial, and thus undeserving of enhanced protection. *Id.* at 45a.

The court of appeals therefore reversed the district court's judgment and remanded the case for further proceedings. U.S. Healthcare's request for rehearing and suggestion for rehearing *en banc* were denied. App. 68a-69a.

REASONS FOR GRANTING THE PETITION

The decision below represents a significant departure from this Court's First Amendment case law. Although the court of appeals recognized that the public figure test is the "traditional" method for determining the level of constitutional protection afforded to allegedly false speech, it concluded that this inquiry is "not helpful" when the speech takes the form of commercial advertising. The court of appeals' creation of an exception to the public figure doctrine is without precedent, and is inconsistent with the rationale for the doctrine itself. At a minimum, review here is required to address the novel First Amendment restrictions imposed by the decision below.

Further review also is required to prevent the inevitable confusion that will result when lower courts attempt to follow the ruling of the court of appeals. Although the court made it clear that it considers the existing public figure doctrine inadequate, and strongly indicated that it has created a *per se* exception to the doctrine for commercial speech cases, the court nonetheless suggested that

a different (and unspecified) analysis may be applied in future cases.

The court of appeals' opinion also is troublesome because of its potentially broad implications for cases other than those involving advertising. The court's reliance on the speaker's motive in determining the proper level of constitutional protection, even though inconsistent with this Court's precedent, may nonetheless become a source of even greater mischief if it is construed to extend beyond the commercial speech context.

Finally, even if this Court were inclined to recognize an "advertising exception" to the public figure doctrine, further review of the decision below would be necessary. The court of appeals has created a sweeping rule that diminishes the constitutional protection for *all* commercial advertisements, even those that address matters of public concern. Such a rule is inconsistent with the numerous decisions of this Court that recognize that speech on matters of public concern is entitled to enhanced constitutional protection. The inevitable result of the decision below will be to chill content-filled advertising, and to restrict the flow of important information to the public.

A. The Court Of Appeals Has Improperly Created An Advertising Exception To The Public Figure Doctrine.

It has been settled law for more than twenty years that when a public figure sues for defamation, he must satisfy a higher burden of proof than a private plaintiff. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Where a defamation plaintiff has "thrust [itself] to the forefront of particular public controversies in order to influence the resolution of the issues involved," that plaintiff may not recover unless it can prove that the defendant acted with actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

The reason for this enhanced protection for speech directed toward public figures is two-fold. First, public figures normally have greater access to the media than private plaintiffs, and thus have a greater opportunity to protect their reputation by responding to false speech with speech of their own. *Gertz*, 418 U.S. at 344; *Wolston v. Reader's Digest Association*, 443 U.S. 157, 164 (1979). Second, there is a much lower societal interest in compensating public figures for harm to reputation, because by injecting themselves into a public debate, these plaintiffs have voluntarily assumed the risk that they will be the subject of defamatory speech. *Gertz*, 418 U.S. at 344-45. Thus, the public figure doctrine strikes a balance in favor of the full airing of speech on matters of public concern, and encourages public figures to respond to offensive statements with corrective speech, rather than litigation. *Cf. New York Times v. Sullivan*, 376 U.S. at 272 (" 'Whatever is added to the field of libel is taken from the field of free debate' " (citation and footnote omitted)).

The district court specifically found that U.S. Healthcare was a limited purpose public figure. App. 60a. Significantly, the court of appeals did not deny that under the traditional *Gertz* analysis, the district court's conclusion was correct. Indeed, the court acknowledged that the parties have ready access to the media, and that "the magnitude of the advertising campaigns shows their ability to utilize it on a vast scale." App. 47a. The court also recognized that Blue Cross, Blue Shield, and U.S. Healthcare have "thrust themselves into the controversy of who provides better value in health care delivery and insurance" (*id.*), subjects that the court agreed "are at the center of public debate." *Id.* at 45a.[11]

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[11] Blue Cross and Blue Shield acknowledge that, under the traditional *Gertz* analysis, they also are limited purpose public figures with respect to their counterclaims against U.S. Healthcare.

Nevertheless, the court of appeals decided that "[t]he express analysis in *Gertz* is not helpful in the context of a competitive advertising war" (App. 49a), and it therefore embarked on its own analysis of whether and how the plaintiff's status should influence the degree of constitutional protection afforded. The court ultimately concluded that the format and purpose of the speech—advertising—overrode the justifications for the public figure test, and on that basis held that the actual malice requirement was inapplicable. In short, by refusing to apply the analysis set forth in the *Gertz* line of cases, the court of appeals created an "advertising exception" to the public figure doctrine.[12]

The court of appeals did not cite a single case from this or any other court that recognizes this exception. This is hardly surprising, since the form of the *defendant's* speech bears little logical relation to whether the *plaintiff* has the requisite attributes of a public figure. Regardless of whether Blue Cross and Blue Shield had made their challenged statements in an advertisement or in some other form, U.S. Healthcare's access to the media would remain the same, as would its voluntary participation in the ongoing public debate.

Moreover, the rationale that supports the public figure doctrine is inconsistent with the kind of exception created here. One purpose of the doctrine is to identify those plaintiffs who have the ability to rebut erroneous and

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[12] As discussed below, the precise scope of the court of appeals' exception is open to some confusion. Although the court appears to have created a rule that makes the public figure test inapplicable in all advertising cases, there is language in the opinion that suggests that a modified public figure test might be applied in future cases. *See* App. 49a ("a corporation must do more than the claimants have done here to become a limited purpose public figure under *Gertz*"). Regardless of whether the court of appeals intended to abandon or simply modify the existing public figure test, it has undeniably departed from this Court's decisions.

defamatory speech with responsive speech. *See Gertz*, 418 U.S. at 344; *Butts*, 388 U.S. at 155 (plurality opinion). In creating an exception based on the format and purpose of the speech, the court of appeals has shifted the balance previously struck by this Court, and has encouraged public figures to punish allegedly offending speech through litigation, rather than to respond with speech of their own. Nothing in the case law concerning the public figure doctrine leaves room for this kind of exception.

Petitioners submit that the *Gertz* line of cases should control here. Nevertheless, as the court of appeals observed, this Court has not yet considered the precise question presented, and there are no cases that squarely reject the lower court's analysis. The novelty of the inquiry, however, is no justification for postponing review. Both the scope of the court of appeals' exception and the justification for its creation are inconsistent with this Court's precedent, and will lead to a significant restriction on First Amendment interests if followed by other courts.

There can be little doubt that, as written, the court of appeals' opinion will lead to considerable confusion in the lower courts. Although the court made it clear that it was departing from the *Gertz* analysis, and strongly indicated that the public figure concept would never be relevant to speech in the form of advertising, it concluded its discussion of this issue by stating that "a corporation must do more" than the parties in this case have done before it can be considered a public figure in the commercial speech context. App. 49a. The court gave no indication what the parties could or should have shown to affect the public figure inquiry. The message to the lower courts is therefore ambiguous: the court first indicates that the exception to the public figure doctrine is a *per se* rule, then later suggests that if the plaintiff had some different, unspecified attributes, the doctrine might in fact apply. Given the special importance of clear, man-

ageable rules in the First Amendment area, *see Gertz*, 418 U.S. at 343-44, the lack of guidance to the trial courts is a cause for real concern.

The confusion will be compounded by the fact that the court of appeals' justification for its departure from *Gertz* simply does not support its result. The most troubling feature of the rationale is the suggestion that courts should look to the defendant's *motive* for speaking when determining whether the public figure test should apply. The court stated that heightened constitutional protection is inappropriate here, because "[a]lthough some of the advertisements touch on matters of public concern, their central thrust is commercial. . . . [T]he parties have acted primarily to generate revenue by influencing customers, not to resolve 'the issues involved.'" App. 49a.

This reliance on the speaker's motive is misplaced. This Court has recognized that an inquiry into the speaker's mind for purposes of drawing constitutional distinctions is inadvisable:

> [I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), we held that even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment . . . . [W]hile such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988). The Court reiterated the point last term, stating:

> Nor can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice. The allegedly defamatory statements at issue in the *New York Times* case were themselves published as part of a paid

> advertisement. . . . If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.

Harte-Hanks Communications v. Connaughton, 109 S. Ct. 2678, 2685 (1989).

The court of appeals' emphasis on the speaker's economic motivation has potential effects far beyond the boundaries of this case: not only advertisers, but professional authors, speech writers, and lobbyists all may be said to speak with an economic motivation, rather than a pure desire to resolve the debate. *Cf. Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 580 (1980) (Stevens, J., concurring) ("Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward"). *See generally* Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 640 (1990). The court of appeals surely did not intend such a dramatic departure from *Gertz*, but nothing in its discussion suggests a principled limitation.

The court of appeals' second justification for abandoning *Gertz* is similarly unpersuasive. The court began with the debatable assumption that "[m]ost products can be linked to a public issue." App. 49a (citing *Central Hudson*, 447 U.S. at 563 n.5). Petitioners submit that this premise is incorrect. Many, and perhaps most, comparative advertisements do not have any relation to an issue of public concern.[13]

Even in cases where the relation to a public issue is arguable, the court below failed to distinguish between

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[13] It is difficult to imagine a public issue implicated by advertisements that compare Diet Coke with Diet Pepsi, or that promote businesses that accept Visa but not American Express.

advertisements for products that can conceivably be "linked" to a public issue and advertisements like those in this case, which describe and advocate products that are themselves the public issue in question. *See* Part B, *infra*. The court of appeals' sweeping rationale for its departure from precedent was thus not necessary to avoid the perceived problem of providing heightened constitutional protection to commercial advertising generally.

B. Even If It Is Appropriate To Recognize An Advertising Exception To The Public Figure Doctrine, Such An Exception Should Not Remove First Amendment Protection From Advertising That Addresses A Matter Of Public Concern.

In fashioning its exception to the public figure doctrine, the court of appeals failed to give due regard to whether the advertising involved an issue of public concern. Thus, even if this Court were to conclude that some form of exception is needed, review would still be warranted because the exception created by the court of appeals is overbroad.

Although the court of appeals recognized that speech on matters of public concern is "'at the heart of the First Amendment's protection,'" App. 28a (quoting *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758-59 (1985)), it nonetheless based its ruling solely on whether the speech could properly be classified as commercial:

> [T]raditional defamation analysis would have us consider the public or private nature of the speech in assessing the weight of the First Amendment interests. We believe, however, that the novel facts here require a different approach. Our appraisal of these interests depends on whether the speech at issue can properly be characterized as commercial speech.

App. 33a-34a (footnote omitted).

This Court frequently has recognized that speech on matters of public concern is entitled to greater consti-

tutional protection than speech that is only of private interest. In defamation cases, for example, the Court has held that where speech involves a matter of public concern, the First Amendment requires a private figure plaintiff to prove the falsity of the allegedly defamatory speech. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). The Court's opinion stressed the special status of speech on matters of public concern:

> One can discern in [the Court's defamation] decisions two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law.

Id. at 775.[14]

Comparison of *Gertz* with *Dun & Bradstreet* illustrates this point. In *Gertz*, the Court held that when speech involves a matter of public concern, the First Amendment precludes a private figure defamation plaintiff from recovering presumed and punitive damages absent a show-

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[14] Although *Hepps* involved a media defendant, the Court has applied the *New York Times* rule, from its inception, to non-media defendants. *See, e.g., Henry v. Collins*, 380 U.S. 356 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964). A majority of the Court has agreed that the rights of non-media defendants are no less than those of media defendants. *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 773 & n.4 (1985) (White, J., concurring in the judgment); *id.* at 783-84 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting). The court of appeals also has declined to limit the *New York Times* protections to media defendants. *See Avins v. White*, 627 F.2d 637, 648-49 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980).

ing of actual malice. 418 U.S. at 348-50. In *Dun & Bradstreet*, however, where the speech in question did not involve a matter of public concern, a majority of the Court ruled that a private figure plaintiff could recover such damages without a showing of actual malice. 472 U.S. at 763 (opinion of Powell, J., joined by Rehnquist and O'Connor, JJ.); *id.* at 764 (Burger, C.J., concurring in the judgment); *id.* at 774 (White, J., concurring in the judgment).

In non-defamation cases as well, the Court has recognized the importance of the distinction between speech on matters of public concern and speech on matters of private interest. In *Connick v. Meyers*, 461 U.S. 138 (1983), for example, the Court held that a public employee who was discharged for speaking out on a matter of purely private interest could not recover for wrongful discharge under 42 U.S.C. § 1983. *See also Pickering v. Board of Education*, 391 U.S. 563 (1968). But in *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court applied *Connick* to reach the opposite result in the case of a public employee who was discharged for speaking on a matter of public concern.

Indeed, even in the area of commercial advertising, the Court has ruled that speech on issues of public concern should receive greater protection than other kinds of advertising. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Court held that a commercial advertisement for abortion services—a matter of clear public concern—was entitled to enhanced constitutional protection because it "did more than simply propose a commercial transaction." *Id.* at 822. The Court rejected the reasoning of the Supreme Court of Virginia, which had held that the speaker "lacked a legitimate First Amendment interest inasmuch as his activity 'was of a purely commercial nature . . . .'" *Id.* at 814-15 (quoting 213 Va. at 198, 191 S.E.2d at 177-78). The Court observed that "[t]he State was not free of constitutional restraint merely

because the advertisement involved sales or 'solicitations,' or because appellant was paid for printing it, or because appellant's motive or the motive of the advertiser may have involved financial gain." *Id.* at 818 (citations omitted). The disputed advertisement was found to be protected by the First Amendment because "[v]iewed in its entirety, [it] conveyed information of potential public interest and value to a diverse audience—not only to readers possibly in need of the services offered . . . ." *Id.* at 822.

The court of appeals rejected petitioners' argument that *Bigelow* is controlling here, and instead relied primarily on a footnote in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). The Court there invalidated a regulation of the New York Public Service Commission that banned an electric utility from advertising to promote the use of electricity. In an opinion concurring in the judgment, Justice Stevens maintained that the New York regulation suppressed more than just commercial speech because it banned advertising that promoted the consumption of electricity by touting its environmental benefits. *Id.* at 581.

The Court declined to adopt Justice Stevens' more expansive rationale for striking down the challenged regulation. In the Court's view, Justice Stevens' approach: (1) "would blur further the line the Court has sought to draw in commercial speech cases"; (2) "would grant broad constitutional protection to any advertising that links a product to a current public debate"; and (3) failed to take into account that "many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety." 447 U.S. at 562-63 n.5.

Quoting extensively from this footnote, the court of appeals concluded that *Central Hudson* "prevents an advertiser from immunizing, in effect, otherwise defamatory speech . . . simply by reference to an issue of public concern." App. 42a-43a. But the advertising at issue in

this case does not simply *link* a product to a public debate, or make *reference* to a public debate. Like the abortion services at issue in *Bigelow*, the various means of healthcare financing discussed in petitioners' advertising are *themselves* matters of public concern. The court of appeals itself agreed that "the products advertised here—health care insurance and delivery—are at the center of public debate." App. 45a. Since few products or services are themselves matters of public concern, the Court's concern in *Central Hudson* that a wide variety of advertising could be "immunized" by "reference" to a public issue is not implicated here.

As the court of appeals and this Court have acknowledged, commercial entities " 'enjoy the full panoply of First Amendment protections for their direct comments on public issues.' " App. 43a-44a (quoting *Central Hudson*, 447 U.S. at 562 n.5); *see also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983). In practice, a paid advertisement or other commercial statement often may constitute the only viable means through which a company can comment directly about its products or services. This is particularly so for new products, like petitioners' PPO coverage, designed to provide an improved alternative to products already on the market. When a product is itself at the center of a public debate, a company's advertisements regarding that product must be accorded special constitutional safeguards.

This case demonstrates the danger of denying heightened constitutional protection even to commercial speech that addresses matters of public concern. Although the relative merits of competing forms of health care coverage continue to be debated petitioners here will be chilled from actively participating in this ongoing debate, because of the risk that their speech will be viewed as "commercial" and thus unworthy of full constitutional protection.

The court of appeals identified four characteristics of commercial speech that it believed justified its ruling.

See page 9, *supra*. Even assuming that these characteristics present legitimate bases for providing less constitutional protection to advertising that does not address matters of public importance, they have little or no bearing on advertisements that address public issues.

First, while commercial speech commonly adds little to the marketplace of ideas, there is no reason to believe that commercial speech on a matter of public importance contributes less to a public debate than similar speech in a non-commercial context. The content of the message should be more important than the format of the speech.

Second, although advertising *generally* may not be chilled by the lack of constitutional protection, substantive advertisements that directly comment about products or issues at the center of a public debate definitely will be chilled. The threat of liability will almost certainly result in a shift away from informative advertisements, toward bland, image-creating advertisements that present no useful information.

Third, advertisers may well have greater time to verify the accuracy of their speech than do newspaper or other media publishers. But advertisers have no greater time or ability to verify their speech (or protect against false impressions) than, say, the author of a book, a producer of a motion picture, or a politician who compares his or her record to that of an opponent. *Cf.* Kozinski & Banner, *supra*, 76 Va. L. Rev. at 634-38.[15] Moreover, par-

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[15] Judge Kozinski and his co-author also question whether the alleged verifiability of commercial speech offers a proper basis for affording that speech less constitutional protection:

> Why should the objectivity of speech counsel in favor of affording it less protection? One could well argue the contrary. To the extent certain speech is easily susceptible to debunking by counterspeech, there seems to be *less*, not more justification for government interference.

76 Va. L. Rev. at 636 (emphasis in original).

ticularly where the advertiser focuses on a competitor's products or services, it undoubtedly will have only restricted access to all potentially relevant information about those products or services.

Finally, the court of appeals observed that " 'to require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.' " App. 39a (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)). By announcing a broad rule that fails to distinguish between advertising concerning a subject of public debate and other forms of advertising, however, the court of appeals has undermined its own justification for departing from the *Gertz* test. Indeed, the court's analysis itself levels First Amendment protections by treating all commercial advertising alike.

The First Amendment requires that a finer line be drawn. Although petitioners believe there should be no "advertising exception" to the *Gertz* public figure analysis, at a minimum the Court should ensure that any such exception does not strip First Amendment protections from advertisements regarding an issue of public concern.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES A. YOUNG *
STRADLEY, RONON, STEVENS & YOUNG
2600 One Commerce Square
Philadelphia, PA 19103
(215) 564-8000
Attorney for Petitioner Pennsylvania Blue Shield

JAY H. CALVERT, JR.
J. GORDON COONEY, JR.
ANDREW D. LEIPOLD
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000

PETER BUSCEMI *
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Attorneys for Petitioners Independence Blue Cross and David S. Markson

May 25, 1990

* Counsel of Record

APPENDICES

APPENDICES

APPENDIX A

Filed March 9, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1180 and 88-1205

U.S. HEALTHCARE, INC.,
UNITED STATES HEALTH CARE
SYSTEMS OF PENNSYLVANIA, INC.
and HEALTH MAINTENANCE ORGANIZATION OF
NEW JERSEY, INC.
Appellants in 88-1180

v.

BLUE CROSS OF GREATER PHILADELPHIA,
PENNSYLVANIA BLUE SHIELD and
DAVID MARKSON

Blue Cross of Greater
Philadelphia ("Blue Cross")
and Philadelphia Blue
Shield
("Blue Shield"),
Appellants in 88-1205

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civil Action No. 86-6452)

Argued October 18, 1988

Before: STAPLETON, SCIRICA and
COWEN, *Circuit Judges*

(Filed March 9, 1990)

DAVID F. SIMON, ESQ. (Argued)
DAVID I. BOOKSPAN, ESQ.
GARY L. LESHKO, ESQ.
Wolf, Block, Schorr &
Solis-Cohen
Packard Building, 12th Floor
15th and Chestnut Streets
Philadelphia, Pennsylvania
19102

Attorneys for Appellants-
Cross-Appellees,
U.S. Healthcare, Inc., United
States Health Care Systems of
Pennsylvania, Inc. and Health
Maintenance Organization of
New Jersey, Inc.

JAY H. CALVERT, JR., ESQ.
(Argued)
JOHN H. LEWIS, JR., ESQ.
RONALD B. HAUBEN, ESQ.
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, Pennsylvania
19103

Attorneys for Appellees-
Cross-Appellants, Blue Cross
of Greater Philadelphia and
David S. Markson

HENRY KOLOWRAT, ESQ.
Dechert, Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania
19102

JAMES A. YOUNG, ESQ. (Argued)
TIMOTHY I. MCCANN, ESQ.
Sprecher, Felix, Visco,
Hutchison & Young
The Fidelity Building, 23rd Floor
123 South Broad Street
Philadelphia, Pennsylvania
19109
Attorneys for Appellee-
Cross-Appellant,
Pennsylvania Blue Shield

OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

U.S. Healthcare, Inc. and it subsidiaries, United States Health Care Systems of Pennsylvania, Inc. and Health Maintenance Organization of New Jersey, Inc. (collectively, "U.S. Healthcare"), appeal from the district court's post-trial entry of judgment in favor of Blue Cross of Philadelphia, its president David Markson, and Pennsylvania Blue Shield (collectively, "Blue Cross/Blue Shield"), directed under Fed. R. Civ. P. 50(b) on U.S. Healthcare's federal and pendent state law claims alleging violations of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1982), commercial disparagement, defamation and tortious interference with contractual relations. Blue Cross/Blue Shield, in turn, appeals from the entry of judgment on the verdict in favor of U.S. Healthcare on Blue Cross/Blue Shield's counterclaims alleging the same causes of action brought by U.S. Healthcare. Additionally, Blue Cross/Blue Shield appeals the pre-trial dismissal of the abuse of process counts in its counterclaims. We will reverse the grant of the Rule 50(b) motions, the judgment on the verdict in favor of U.S. Healthcare on Blue Cross/Blue Shield's counterclaims and the dismissal of the counts on abuse of process.

I.

FACTS AND PROCEDURAL HISTORY

These cross appeals arise from a comparative advertising war between giants of the health care industry in the Delaware Valley—U.S. Healthcare on the one side and Blue Cross/Blue Shield on the other. The thrust of these claims is that each side asserts the other's advertising misrepresented both parties' products.

For over fifty years, Blue Cross/Blue Shield operated as the largest health insurer in Southeastern Pennsylvania by offering "traditional" medical insurance coverage.[1] Traditional insurance protects the subscriber from "major" medical expenses, with the insurer paying a negotiated amount based upon the services rendered, and the subscriber generally paying a deductible or some other amount. The subscriber has freedom in choosing hospitals and health care providers (i.e., doctors).

In the early 1970's, U.S. Healthcare began providing an alternative to traditional insurance in the form of a health maintenance organization, generically known as an "HMO." An HMO acts as both an insurer and a provider of specified services that are more comprehensive than those offered by traditional insurance. Generally, HMO subscribers choose a primary health care provider from the HMO network who coordinates their health care services and determines when hospital admission or treatment from a specialist is required. Usually, subscribers are not covered for services obtained without this permission or from providers outside this network. By 1986, U.S. Healthcare was the largest HMO in the area, claiming almost 600,000 members.[2] During the same pe-

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[1] Through a joint operating agreement, Blue Cross acts as Blue Shield's agent in Southeastern Pennsylvania.

[2] The testimony at trial indicated that there are fifteen or sixteen HMO's in the Philadelphia area, with four of them enjoying the greatest market share.

riod, Blue Cross/Blue Shield experienced a loss in enrollment of over 1% per year, with a large number of those subscribers choosing HMO coverage over traditional insurance, and a majority of those defectors choosing a U.S. Healthcare company.

Blue Cross/Blue Shield considered a number of strategies to regain its market position, including the acquisition of its own HMO.[3] In late 1985, in an admitted attempt to compete with HMO, Blue Cross/Blue Shield introduced a new product that it called "Personal Choice," known generically as a preferred provider organization or "PPO." PPO insurance provides subscribers with a "network" of health care providers and hospitals, and generally "covers" subscribers only for services obtained from the network providers and administered at the network hospitals. Subscribers must obtain permission to receive treatment from providers outside the network, and in such instances receive at most only partial coverage.

Thereafter, Blue Cross/Blue Shield consulted with two separate advertising agencies before arriving at a marketing strategy for its new product.[4] In July 1986, Blue Cross/Blue Shield launched what it termed a deliberately "aggressive and provocative" comparative advertising campaign calculated "to introduce and increase the attractiveness of its products"—in particular, Personal Choice—at the expense of HMO products. Blue Cross/Blue Shield's campaign, which included direct mailings,

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[3] At the end of 1986, Blue Cross's holding company, QQC, Inc. [*sic*; should be "QCC"], acquired Delaware Valley HMO. In the words of Markson, who also served as president of QQC, [*sic*] the acquisition was made in order to "move the corporation into the triple option [of traditional, PPO, and HMO insurance]."

[4] Under the joint operating agreement, Blue Cross acted as Blue Shield's agent in preparing and publishing the advertisements. Blue Shield, however, had the right to veto any advertising prior to publication.

as well as television, radio and print advertisements, ran for about six months at a total cost of approximately $2.175 million. According to a Blue Cross memorandum that purported to reflect the directions of Markson, the campaign was designed specifically to "reduce the attrativeness of [HMO]."

The Blue Cross/Blue Shield advertising campaign consisted of eight different advertisements for the print media, seven different advertisements for television, three different advertisements for radio, and a direct mailing including a folding brochure. The eight print advertisements compare the features of HMO and Personal Choice. Seven of the eight represent that with HMO, the subscriber selects a "primary care physician" who, in turn, must give permission before HMO will provide coverage for examination by a specialist. (The eighth print advertisement simply states that with Personal Choice, the subscriber may be examined by a specialist whenever he chooses, without "permission.") After describing HMO's referral procedure, however, three of the eight print advertisements—as well as the brochure—say the following:

> You should also know that through a series of financial incentives, HMO encourages this doctor to handle as many patients as possible without referring to a specialist. When an HMO doctor does make a specialist referral, it could take money directly out of his pocket. Make too many referrals, and he could find himself in trouble with HMO.[5]

One of the print advertisements and the brochure also feature a senior citizen under the banner heading "Your money or your life," juxtaposed with Blue Cross/Blue Shield's description of "The high cost of HMO Medicare."

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[5] One of the print advertisements replaces the last sentence with the question, "How many doctors do you know who want to pay your doctor's bill?"

Of the seven television advertisements run by Blue Cross/Blue Shield, four are innocuous, mentioning HMO only in the closing slogan common to all seven of the ads: "Personal Choice. Better than HMO. So good, it's Blue Cross and Blue Shield." The fifth features an indignant every man, who simply states "I resent having to ask my HMO doctor for permission to see a specialist," before a spokesperson extols the benefits of Personal Choice without reference to HMO until, again, the closing slogan. The sixth features a cab driver who says, "I don't like those HMO health plans. You get one doctor, no choice of hospitals," before a shopper tells him about the virtues of Personal Choice—again, without reference to HMO until the closing slogan. The seventh television advertisement used by Blue Cross/Blue Shield, while following the same general format, seems to us a dramatic departure from the others in that it appears consciously designed to play upon the fears of the consuming public. The commercial features of grief-stricken woman who says, "The hospital my HMO sent me to just wasn't enough. It's my fault." The implication of the advertisement is that some tragedy has befallen the woman because of her choice of health care.

The three radio advertisements of Blue Cross/Blue Shield compare the features of HMO and Personal Choice. All represent that HMO limits choice of hospitals and physicians and requires plan permission to see a specialist, but that Personal Choice provides unlimited choice of network hospitals and physicians and affords unrestricted access to specialists.

U.S. Healthcare responded immediately to Blue Cross/Blue Shield's promotional campaign. Within a week, U.S. Healthcare filed suit in Philadelphia County Court of Common Pleas alleging commercial disparagement, defamation and tortious interference with contractual relations. U.S. Healthcare also issued concurrent press releases describing the basis of the litigation. In addition,

the company embarked upon its own aggressive, comparative advertising blitz.

The responsive advertising campaign, which began sometime after the Blue Cross/Blue Shield campaign and ran until late February 1987, cost $1.255 million. U.S. Healthcare's campaign consisted of five different advertisements for the print media, four different television advertisements, and two different radio advertisements. Of these, two advertisements were adapted for all three media as a response to Blue Cross/Blue Shield's most serious criticisms.

The first of these multi-media advertisements—apparently attempting to counteract the Blue Cross/Blue Shield message that HMO doctors sacrificed quality of care for higher profit—emphasizes the length to which U.S. Heathcare will go to provide its subscribers with the best treatment available. It features an HMO doctor with a little girl who, it quickly becomes apparent, is both very healthy and a former HMO patient. While the exact text varies according to the medium, all versions feature the HMO doctor saying that this girl, who required a unique wrist operation, was sent to Baltimore to be operated on by "the best [surgeon] in the country" rather than one of HMO's fine surgeons.

The second multi-media advertisement addresses HMO's practice of allowing examination by specialists only when the subscribed is referred by his primary care physician. The advertisement features just such a physician, explaining that the purpose of a primary care physician is to help the subscriber decide what type of specialist should be consulted, so that the subscriber can be sure of receiving the treatment he needs. Neither multi-media advertisement makes any reference to Blue Cross/Blue Shield.

U.S. Healthcare's responsive campaign did not just highlight the positive characteristics in its own product,

but also featured "anti-Blue Cross" advertisements. Of the three remaining print advertisements, one simply shows a compartive list of the features available under HMO and Personal Choice, with a banner heading that reads "It's your choice." The other two explain that under Personal Choice, the number of hospitals available to the subscriber is limited and, moreover, that many Personal Choice doctors do not have admitting privileges at even those few. One of these advertisements ran under a banner heading of "When it Comes to Being Admitted to a Hospital, There's Something Personal Choice May Not Be Willing to Admit": the other ran under a banner heading of "If You Really Look Into 'Personal Choice,' You Might Have a Better Name For It."

One of the two remaining television advertisements shows a person flipping through the Hospitals and Physicians Directory of Personal Choice, pointing out the "gray area" of physicians without admitting privileges —essentially making the same point as the two print advertisements. The final television commercial was U.S. Healthcare's own attempt to play upon the fears of the consuming public. As solemn music plays, the narrator lists the shortcomings of Personal Choice while the camera pans from a Personal Choice brochure resting on the pillow of a hospital bed to distraught family members standing at bedside. The advertisement closes with a pair of hands pulling a sheet over the Personal Choice brochure.

Thereafter, U.S. Healthcare re-filed its state claims in federal court in the Eastern District of Pennsylvania, adding its § 43(a) Lanham Act claim.[6] Federal subject matter jurisdiction was premised on the assertion of a federal question, 28 U.S.C. § 1331 (1982), and on claims of unfair competition, 28 U.S.C. § 1338(a) (1982).

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[6] After filing the federal claims, the parties agreed to stay the state court action.

Pendant jurisdiction was exercised over the state law claims. Blue Cross/Blue Shield counterclaimed on the same theories of liability, while also alleging abuse of process and malicious use of process. Before trial, the district court dismissed the abuse of process and malicious use of process counts in Blue Cross/Blue Shield's counterclaims.

After a fourteen-day trial, followed by eight days of deliberations, the jury announced it was deadlocked on all issues of liability and damages. The district court declared a mistrial and then, before excusing the jurors, invited them to share their thoughts on the case for the benefit of the lawyers. It became apparent that, with regard to the counterclaims, the jurors were not far from unanimity. Consequently, the district court sent the jury back to deliberate whether Blue Cross/Blue Shield could recover damages on its counterclaims. Only then did the jury return a verdict against Blue Cross/Blue Shield on its counterclaims. The district court thereafter entered judgment for U.S. Healthcare on the counterclaims and scheduled a new trial on U.S. Healthcare's own claims.

The case was never retried. Instead, Blue Cross/Blue Shield filed a motion under Fed. R. Civ. P. 50(b) requesting the court to direct entry of judgment in its favor, on the grounds that the advertisements were entitled to heightened constitutional protection under the First Amendment, and that U.S. Healthcare had not met the applicable standard of proof, set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *et seq.* The district court granted the motion. *U.S. Healthcare, Inc. v. Blue Cross*, No. 86-6452 (E.D. Pa. Mar. 7, 1988). The court held that because the objects of the advertisements are "public figures," and because the matters in the advertisements are "community health issues of public concern," heightened constitutional protections attach to this speech. The court reasoned that the First Amendment limited the power of the state and of Congress to

award damages resulting from the allegedly false and misleading advertisements. Accordingly, the district court held that in order to prevail on their respective claims of Lanham Act violation, commercial disparagement, defamation and tortious interference with contract, both parties were required to prove each claim by clear and convincing evidence: (1) that the other side published the advertisements with knowledge or with reckless disregard of their falsity, and (2) that the advertisements were false. Applying this standard of proof, the court concluded that "[a]lthough the jury could reasonably have concluded that both sides had proven falsity and actual malice by a preponderance of the evidence, neither side has presented clear and convincing evidence [of this]."

This appeal followed.

II.

THE ACTIONABLE CLAIMS AND COUNTERCLAIMS UNDER APPLICABLE SUBSTANTIVE FEDERAL AND STATE LAW

We note initially that federal law governs the substantive issues of the parties' Lanham Act claims, while Pennsylvania law governs the commercial disparagement, defamation and tortious interference with contract claims. Although the district court granted the Rule 50(b) motions on constitutional grounds, we must first determine whether the statements are actionable under the substantive law governing the case before addressing whether the First Amendment prohibits the imposition of liability, since a determination of the former may obviate the need to examine the latter. *See McDowell v. Paiewonsky*, 769 F.2d 942, 945 (3d Cir. 1985); *Avins v. White*, 627 F.2d 637, 642 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 270 (3d Cir. 1980). Furthermore, Blue Cross/Blue Shield argues that the "challenged advertisements are not actionable re-

gardless of the standard of proof."[7] Therefore, we turn to the federal and state substantive law governing the parties' claims to determine whether there might exist a genuine issue of material fact.

A. *Applicable Federal and Pennsylvania Common Law.*

As a threshold matter, we note that the burden of proof for the applicable substantive law is a preponderance of the evidence. On appeal, the parties contest the burden of proof on the Lanham Act claim only. Unless *New York Times* applies, the burden of proof here is a preponderance of the evidence.

1. *Section 43(a) of The Lanham Act.*

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1988), which was recently amended, creates a cause of action for any false description or representation of a product.[8] This proscription extends to misleading de-

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[7] The district court denied Blue Cross/Blue Shield's motions for summary judgment.

[8] Congress amended the section in 1988, essentially "to codify the interpretation it has been given by the courts." S. Rep. No. 515, 100th Cong., 2d Sess. 40, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5577, 5603. The new version, which became effective November 16, 1989, provides:

> (a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> (1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of

scriptions or representations. *Id.; see Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1, 11 (E.D. Pa. 1974); *see also McNeilab, Inc. v. Bristol-Myers Co.*, 656 F. Supp. 88, 90 (E.D. Pa. 1986). "While it has been stated that a failure to disclose facts is not actionable under § 43(a), it is equally true that a statement is actionable under § 43(a) if it is affirmatively misleading, partially incorrect, or untrue as a result of failure to disclose a material fact." 2 J. McCarthy, *Trademarks and Unfair Competition* § 27:7B (2d ed. 1984).

The pre-amendment version, which controlled when the district court considered the matter, applied only to statements made by a defendant about its own products, not to statements about the plaintiff's products. *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 37 (2d Cir. 1982); *Bernard Food Indus., Inc. v. Dietene Co.*, 415 F.2d 1279, 1283 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970). As amended, however, § 43(a) encompasses statements made by a defendant about "his or her *or another person's*" products. 15 U.S.C. 1125(a) (emphasis added).[9]

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his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Trademark Law Revision Act, Pub.L. 100-667, § 132, 102 Stat. 3946 (1988). The only significant change in the provision, for our purposes, is discussed in the following paragraph.

[9] This court must "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). Although there is no statutory direction, the legislative history, which states that the amendment is intended "to make clear that misrepresentations about another's products are as actionable as misrepresentations about one's own," would appear to support retroactive application of the new provision. S. Rep. No. 515, 100th

When analyzing a challenged advertisement, the court first determines what message is conveyed. *Plough, Inc. v. Johnson & Johnson Baby Prods. Co.*, 532 F. Supp. 714, 717 (D. Del. 1982); McCarthy § 27:7B. Sometimes this determination may be made from the advertisement on its face. *Stiffel Co. v. Westwood Lighting Group*, 658 F. Supp. 1103, 1110 (D.N.J. 1987); *e.g.*, *Ames Publishing*, 372 F. Supp. at 12. Nonetheless, "[c]ontext can often be important in discerning the message conveyed." *Plough*, 532 F. Supp. at 717.

After determining the message conveyed, the court must decide whether it is false or misleading. *Stiffel*, 658 F. Supp. at 1110; McCarthy § 27:7B; *see Plough*, 532 F. Supp. at 717. Mere puffing, advertising " 'that is not deceptive for no one would rely on its exaggerated claims,' " is not actionable under § 43(a). *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241, 253 n.23 (D. Del. 1980) (quoting 1 R. Callmann, *Unfair Competition, Trademarks and Monopolies* § 19.2(b)(2) (3d ed. 1967 & 1979 Supp.)). If the advertisement is literally true, the plaintiff "must persuade the court that the persons 'to whom the advertisement is addressed' would find that the message received left a false impression about the product." *Id.* at 251 (citation omitted); *see Stiffel*, 658 F. Supp. at 1110. Finally, establishing lack of substantiation of defendant's claim is insufficient without also establishing falsity or deception. *Toro*, 499 F. Supp. at 253.

The plaintiff must also show that defendant's misrepresentation is " 'material, in that it is likely to influence the purchasing decision.' " *Id.* at 251 (citation omitted); *see* McCarthy § 27:4D. However, "there is no requirement that the falsification occur wilfully and with

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Cong., 2d Sess. 40, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5577, 5603. Having considered the parties, the nature of their rights and the impact on those rights of this change in law, *Bradley*, 416 U.S. at 717, we perceive no threat of manifest injustice and shall apply the provisions as it now is written.

intent to deceive." *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 648 (3d Cir. 1958).

Next, § 43(a) requires that the defendant use the false or misleading description or representation "in commerce." 15 U.S.C. § 1125(a); *see SK&F, Co. v. Premo Pharmaceutical Laboratories, Inc.*, 625 F.2d 1055, 1065 (3d Cir. 1980). The commerce requirement has been broadly interpreted. McCarthy § 27:6C.

Finally, § 43(a) provides a remedy to one who "is or is likely to be damaged by [the false or misleading description or representation]." 15 U.S.C. § 1125(a). To recover damages, a plaintiff must show that the "falsification [or misrepresentation] actually deceives a portion of the buying public." *Parkway Baking*, 255 F.2d at 648; *Walker-Davis Publications, Inc. v. Penton/IPC, Inc.*, 509 F. Supp. 430, 435 (E.D. Pa. 1981) (citing *Parkway Baking*). "This does not place upon the plaintiff a burden of proving detailed individualization of loss of sales. Such proof goes to quantum of damages and not to the very right to recover." *Parkway Baking*, 255 F.2d at 648.

Judge Pollak has summarized well this area of the law in the following test:

> 1) that defendant has made false or misleading statements as to his own product [or another's]; 2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; 3) that the deception is material in that it is likely to influence purchasing decisions; 4) that the advertised goods travelled in interstate commerce; and 5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc.

Max Daetwyler Corp. v. Input Graphics, Inc., 545 F. Supp. 165, 171 (E.D. Pa. 1982) (citing *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165-66 (2d Cir. 1978)).

2. *Defamation.*

Under Pennsylvania law, a defamatory statement is one that " 'tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' " *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 303 (1960) (quoting Restatement of Torts § 559 (1938)); *accord Thomas Merton Center v. Rockwell Int'l Corp.*, 497 Pa. 460, 464 (1981), *cert. denied*, 457 U.S. 1134 (1982). It is for the court to determine, in the first instance, whether the statement of which the plaintiff complained is capable of a defamatory meaning; if the court decides that it is capable of a defamatory meaning, then it is for the jury to decide if the statement was so understood by the reader or listener. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 442 (1971). To ascertain the meaning of an allegedly defamatory statement, the statement must be examined in context. *Baker v. Lafayette College*, 516 Pa. 291, 296 (1987).

> The test is the effect the [statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate. The words must be given by judges and juries the same signification that other people are likely to attribute to them.

Corabi, 441 Pa. at 447 (citation omitted). Opinion that fails to imply underlying defamatory facts cannot support the cause of action. *Baker*, 516 Pa. at 297.

In an action for defamation, the plaintiff has the burden of proving 1) the defamatory character of the communication; 2) its publication by the defendant; 3) its application to the plaintiff; 4) an understanding by the reader or listener of its defamtory meaning; and 5) an understanding by the reader or listener of an intent by the defendant that the statement refer to the plaintiff. 42 Pa. Cons. Stat. § 8343(a)(1)-(5) (1988). Addition-

ally, in order to recover damages, the plaintiff must demonstrate that the statement results from fault, amounting at least to negligence, on the part of the defendant. *Geyer v. Steinbronn*, 351 Pa. Super. 536, 554-55 (1986); *Rutt v. Bethlehems' Globe Publishing Co.*, 335 Pa. Super. 163, 186 (1984); 42 Pa. Cons. Stat. § 8344 (1988). Finally, the plaintiff has the burden of proving any special harm resulting from the statement. 42 Pa. Cons. Stat. § 8343(a)(6) (1988); *see* Restatement of Torts § 575 comment b (defining special harm).

The defendant, in turn, can defend against a defamation action by proving the truth of the statement,[10] that the subject matter of the statement was of public concern, or that the occasion on which the statement was made or published was of privileged character.[11] *Spain v. Vicente*, 315 Pa. Super. 135, 140 (1983); 42 Pa. Cons. Stat. § 8343(b) (1988); *cf. Corabi*, 441 Pa. at 450 n.6. When the last of these defenses is raised, the burden shifts to the plaintiff to show abuse of the conditionally privileged occasion. *Baird v. Dun & Bradstreet, Inc.*, 446 Pa. 266, 275 (1971); *Rutt*, 335 Pa. Super. at 186-87; 42 Pa. Cons. Stat. § 8343(a)(7) (1988).

3. *Commercial Disparagement.*

A commercially disparaging statement—in contrast to a defamatory statement—is one "which is intended by its publisher to be understood or which is reasonably understood to cast doubt upon the existence or extent of another's property in land, chattels or intangible things, or upon their quality, . . . if the matter is so understood by

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[10] *But see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (in private plaintiff-public issue defamation action against media defendant, there is constitutional requirement to prove falsity of the speech at issue); *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 488 (1982) (Pennsylvania law places burden of proving falsity on plaintiff).

[11] *See infra* Part III (discussing first amendment privilege).

its recipient." *Menefee v. Columbia Broadcasting Sys., Inc.*, 458 Pa. 46, 54 (1974) (quoting Restatement of Torts § 629 (1938)). In order to maintain an action for disparagement, the plaintiff must prove 1) that the disparaging statement of fact is untrue or that the disparaging statement of opinion is incorrect; 2) that no privilege attaches to the statement; and 3) that the plaintiff suffered a direct pecuniary loss as the result of the disparagement. *See Menefee*, 458 Pa. at 53 (quoting Restatement of Torts introductory note to Chapter 28).

The distinction between actions for defamation and disparagement turns on the harm towards which each is directed. An action for commercial disparagement is meant to compensate a vendor for pecuniary loss suffered because statements attacking the quality of his goods have reduced their marketability, while defamation is meant [to] protect an entity's interest in character and reputation. In *Menefee*, the Pennsylvania Supreme Court made the following observation:

> One of the most important purposes for which liability for the publication of matter derogatory to another's personal reputation is imposed is to enable the person defamed to force his accuser into open court so that the accusation, if untrue, may be branded as false by the verdict of a jury. The action for disparagement has no such purpose and cannot be used merely to vindicate one's title to or the quality of one's possessions. . . .

Id. (quoting Restatement of Torts introductory note to Chapter 28).

Given the similar elements of the two torts, deciding which cause of action lies in a given situation can be difficult. The Court of Appeals for the Eighth Circuit gave the following time-honored explanation of when impugnation of the quality of goods crosses the line from disparagement of products to defamation of vendors:

> [W]here the publication on its face is directed against the goods or product of a corporate vendor or manufacturer, it will not be held libelous per se as to the corporation, unless by fair construction and without the aid of extrinsic evidence it imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct in its business in relation to said goods or product.

National Ref. Co. v. Benzo Gas Motor Fuel Co., 20 F.2d 763, 771 (8th Cir.), *cert. denied*, 275 U.S. 570 (1927).

An examination of state court decisions indicates that Pennsylvania law tracks the *National Refining* distinction. *See, e.g., Cosgrove Studio and Camera Shop, Inc. v. Pane*, 408 Pa. 314, 319 (1962) (defamation action lay when competitior's advertisement accused plaintiff of using unnecessary haste and unskilled workmanship in development of customers' film, resulting in its ruin, and implied plaintiff was dishonest in its business practice by inflating prices); *Will v. Press Publishing Co.*, 309 Pa. 539, 544 (1932) (defamation action lay for accusation that plaintiff did not pay accounts of his business, as words implied dishonesty); *Pfeifly v. Henry*, 269 Pa. 533, 535 (1921) (defamation action lay for statement that plaintiff miller dishonestly weighed flour he sold); *see also Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 271 (3d Cir. 1980) (news report that plaintiff corporation deceived customers as to both price and quality of its product capable of defamatory meaning under Pennsylvania law).

4. *Tortious Interference with Contract*

The Restatement of Torts described this tort fifty years ago: "[O]ne who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the

other for the harm caused thereby." Restatement of Torts § 766 (1939). Pennsylvania has adopted this prescription while recognizing two distinct branches of the tort: one concerning existing contractual rights, and another regarding prospective contractual relations.

Regarding existing contractual rights, the Pennsylvania Supreme Court has adopted the test set forth in the Restatement (Second) of Torts: [12]

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the third person's failure to perform the contract.

Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 482 Pa. 416, 431 (1978), *cert. denied*, 442 U.S. 907 (1979); *accord Daniel Adams Assocs., Inc. v. Rimbach Publishing, Inc.*, 360 Pa. Super. 72, 78, *appeal denied*, 517 Pa. 599 (1987). Thus, as a threshold matter, a contract right must be established. *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 208 (1979). In determining the propriety of the actor's conduct, the court is "guided" by the following factors from the Restatement (Second) of Torts:

(a) The nature of the actor's conduct,

(b) The actor's motive,

(c) The interests of the other with which the actor's conduct interferes,

(d) The interests sought to be advanced by the actor,

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[12] The court quoted language from Restatement (Second) of Torts § 766 (Tent. Draft No. 23, 1977). The final restatement is the same in substance. *See* Restatement (Second) of Torts § 766 (1979).

(e) The proximity or remoteness of the actor's conduct to the interference and

(f) The relations between the parties.

Adler, Barish, 482 Pa. at 433.

With respect to prospective contractual relations, the following elements must be demonstrated:

(1) a prospective contractual relation;

(2) the purpose or intent to harm the plaintiff by preventing the relation from occurring;

(3) the absence of privilege or justification on the part of the defendant; and

(4) the occasioning of actual damage resulting from the defendant's conduct.

Thompson Coal Co., 488 Pa. at 208; *accord Vintage Homes, Inc. v. Levin*, 382 Pa. Super. 146, 155 (1989). The Pennsylvania Supreme Court has defined "prospective contractual relation" as "something less than a contractual right, something more than a mere hope." *Thompson Coal Co.*, 488 Pa. at 209. In short, it is "a reasonable probability" that contractual relations will be realized. *Id.* (citing *Glenn v. Point Park College*, 441 Pa. 474, 480 (1971)). Such an expectation may arise from an unenforceable express agreement or an offer. *Glenn*, 441 Pa. at 481 n.6. The privilege determination "is not susceptible of precise definition" but is informed by the " 'rules of the game' " and " 'the area of socially acceptable conduct which the law regards as privileged.' " *Id.* at 482 (citation omitted).

B. *The Actionable Construction of the Advertisements*

From the record before us, both U.S. Healthcare and Blue Cross/Blue Shield have taken a broad approach to this litigation, each complaining about all of the advertisements in the other's comparative campaign. Not all of

the advertisements are actionable under all of the theories alleged. Therefore, we make the following rulings on which advertisements could be found actionable by a jury under the standards we have outlined.

First, we consider as a group three of Blue Cross/Blue Shield's television advertisements, which appear to be mere identification pieces containing no substantive information. They feature actors stating either their trust in Blue Cross/Blue Shield, or their preference for Personal Choice over HMO. Additionally, they all feature the slogan "Better than HMO. So good, it's Blue Cross and Blue Shield." This strikes us as the most innocuous kind of "puffing," common to advertising and presenting no danger of misleading the consuming public. Consequently, we find that no cause of action lies with regard to these three advertisements.

Second, we consider as a group U.S. Healthcare's two multi-media advertisements, one which featured an HMO doctor describing U.S. Healthcare's efforts to provide the best possible treatment for a young girl, and the other which featured an HMO primary care physician describing why she helps HMO patients select which specialists to consult. Neither of these advertisements makes any reference to Blue Cross/Blue Shield and, consequently, the only action that may lie based upon them is one for unfair competition under § 43(a) of the Lanham Act.

In this second group of advertisements, which are only actionable (if at all) under the Lanham Act, we include two of Blue Cross/Blue Shield's advertisements. The first is a print advertisement, targeted specifically at Philadelphia School District employees during a period of "Open Enrollment," that describes the features of Personal Choice without reference to HMO. The second is a television commercial. While similar to the three we found to be innocuous, this advertisement goes one step further, factually representing that Personal Choice cov-

ers "routine doctor visits, prescriptions, even pediatric care." At trial, testimony was adduced as to just how often Personal Choice would cover check-ups and whether these did, in fact, constitute "routine" doctor care. Consequently, we believe there could be a question whether Blue Cross/Blue Shield misrepresented its own product in this advertisement and, hence, it too may give rise to a cause of action under the Lanham Act.

Third, we consider as a group the bulk of the advertisements, which either compare the competing health plans on one or more points, or simply criticize the competitor's health plan without detailed exposition of the advertiser's own competing plan. Because they may contain misrepresentations beyond puffing, a cause of action may lie under the Lanham Act, even for those advertisements that focus exclusively on the competitor's health plan. In addition, as these advertisements all make representations about the competitor's product, a cause of action may lie for commercial disparagement with respect to any of them. None of these, however, could be said to impute to the competitor by fair construction any "fraud, deceit, dishonesty, or reprehensible conduct." *National Refining Co.*, 20 F.2d at 771. Consequently, no cause of action for defamation will lie with regard to these. Finally, to the extent that these advertisements were unpriviliged, were intended to interfere with exisitng or prospective contractual relations and actually did so, an action may lie for tortious interference with contract.

We believe the remaining advertisements are capable of defamatory meaning. These include, first, the Blue Cross/Blue Shield advertisements that suggest HMO primary care physicians have a financial interest in not referring patients to specialists and, indeed, that HMO makes reprisals against those primary care physicians who make too many referrals. These advertisements imply that U.S. Healthcare, the people who run it, and the doctors who are employed by it, all place personal profit

above adequate health care. Such an implication goes beyond the comparative quality of HMO health care to suggest reprehensible conduct by U.S. Healthcare and its employees in the conduct of their business.

Also capable of defamatory meaning is Blue Cross/Blue Shield's "Distraught Woman" advertisement. Her statement that "The hospital my HMO sent me to just wasn't enough," matched with her grief-stricken demeanor, suggests she has suffered some tragedy because of HMO's substandard care. The suggestion that U.S. Healthcare chose to send her to a hospital that could not adequately treat her problem goes beyond the product itself to impute reprehensible conduct to the corporation. Indeed, the scare tactic is the point of the commercial.

Finally, we find U.S. Healthcare's "Critical Condition" television commercial to be capable of a defamatory construction as well. As a dirge plays, the narrator lists the shortcoming of Personal Choice while the camera pans from a Personal Choice brochure resting on the pillow of a hospital bed to distraught family members standing around the bed. At the end of the advertisement, a pair of hands pulls a sheet over the Personal Choice brochure. We do not believe the depiction of a distressing death scene in a health insurance commercial is an uncalculated association. Again, we believe a scare tactic was the intent and, more to the point, a jury could find the commercial suggests Blue Cross/Blue Shield knowingly provides health care so substandard as to be dangerous.[13]

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[13] The district court charged the jury that any of this last group of advertisements would escape defamation liability if it constituted opinion. The following statement by the Supreme Court, although dicta, is regularly cited for the proposition:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). Consequently, a statement of pure opinion receives absolute protection

As to this final group of advertisements, no action for commercial disparagement will lie because the statements are directed at the vendor, not his goods. Nonetheless, Lanham Act claims may lie. Moreover, to the extent that these advertisements were unpriviliged, were intended to interfere with existing or prospective contractual relations and actually did so, an action may lie for tortious interference with contract.

III.

FIRST AMENDMENT PRINCIPLES AND THE STANDARD OF PROOF IN CLAIMS ARISING FROM A COMPARATIVE ADVERTISING CAMPAIGN

Having determined that some of the advertisements may be actionable under federal and state law, we must now consider whether the First Amendment affects the standard of proof. As we have already noted, the district court held that under *New York Times Co. v. Sullivan et seq.* each party must prove as to each claim, by clear and convincing evidence, that the other party acted with actual malice—that is, with knowledge that the advertisement was false or with reckless disregard of whether it was false or not. 376 U.S. 254, 279-80 (1964). In so holding, the court rejected U.S. Healthcare's argument that the advertisements were commercial speech and thereby entitled to less constitutional protection. The district court viewed the comparative advertising campaign giving rise to this litigation as a "dispute . . . about how best to deal with spiraling medical costs," and concluded that, "[t]o characterize the advertisements in this case as mere commercial speech ignores the fact that, at their core, they are instruments in a debate between two

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under the First Amendment. *Jenkins v. KYW*, 829 F.2d 403, 408 (3d Cir. 1987); *Ollman v. Evans*, 750 F.2d 970, 975 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). This matter has not been raised on appeal.

providers of public health care 'intimately involved in the resolution of important public questions.' "

In arguing that the district court erred in applying heightened evidentiary standards to any of its claims, U.S. Healthcare maintains that the *New York Times* standard is "not mandated where, as here, false commercial speech is at issue." In response, Blue Cross/Blue Shield contends that the principles set forth in the commercial speech doctrine are inapplicable to his case because the United States Supreme Court "views damage claims [brought by private citizens] and government restrictions of speech as requiring distinctly different analysis for First Amendment purposes."

A. *Background*

Distinguishing the Supreme Court's First Amendment jurisprudence is an express intention to "lay down broad rules of general application," rather than to allow balancing between competing values on a case-by-case basis, an approach that the Court fears would "lead to unpredictable results and uncertain expectations, and . . . render [its] duty to supervise the lower courts unmanageable." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974). In delineating the limits placed on state authority by the First Amendment, the Court has articulated two distinct lines of cases, one involving defamation and the other involving government regulation of commercial speech.[14] We have found no decision by the Court considering a defamation action involving expression properly characterized as commercial speech.

Despite its intention to enunciate general rules, the Court has implicitly recognized the need for balancing when a novel issue arises. *See, e.g., Philadelphia News-*

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[14] The First Amendment applies to the states through the Fourteenth Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925)).

papers, Inc. v. Hepps, 475 U.S. 767 (1986) (applying balancing test to determine whether private plaintiff or media defendant bears burden of proving falsity). Given the unique issue presented here, we believe it is necessary to evaluate the competing state and First Amendment interests. In taking this approach, we are mindful of the Supreme Court's admonition that nothing in *Gertz* "indicated that [the] same balance would be struck regardless of the type of speech involved." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756-57 (1985) (plurality opinion) (footnote omitted).

Our approach will proceed in light of the analytical framework of the defamation cases. We have found no comparable case, and the parties cite none. In what we believe is a matter of first impression, we are presented with the unique circumstance of allegedly defamatory statements made in the context of a comparative advertising campaign.

B. *Rules and Conceptual Framework*

Most speech is protected by the First Amendment. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984) (there are "few classes of 'unprotected' speech"). "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40 (footnote omitted), *quoted in Jenkins v. KYW*, 829 F.2d 403, 408 (3d Cir. 1987). Even false statments of fact are insulated from liability in some situations.[15] *Hepps*, 475

[15] In the context of government restriction of speech, false and misleading commercial speech have no First Amendment value. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity"). Similarly, in the context of defamation, false statements of fact have "no constitutional

U.S. at 778; *Gertz*, 418 U.S. at 340-41. As Judge Learned Hand put it, the First Amendment " 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.' " *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

Although speech is generally protected, the Supreme Court has "long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.' " *Dun & Bradstreet*, 472 U.S. at 758-59 (footnote and citations omitted). Such speech —unlike expression that is " 'no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and mortality,' " *Gertz*, 418 U.S. at 340 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) —requires heightened constitutional protection in the defamation context.

Our brief review of the cases in this area must begin with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Since 1964, the Court has extended constitutional protection to defamatory criticism of public officials in their official capacity, unless those officials can demonstrate that the defamatory statement was made with "actual malice." *Id.* at 279-80. The issue was whether a paid advertisement soliciting funds to support civil rights demonstrations in the South and the defense of Dr. Martin Luther King against a perjury charge lost all constitutional protection because it contained libelous statements which a jury found to have impugned the reputa-

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value." *Gertz*, 418 U.S. at 340. As we shall see, however, such speech sometimes warrants First Amendment protection in this context.

tion of the Commissioner of Public Affairs for Montgomery, Alabama. The Court framed the issue as public in nature, describing the advertisement as "an expression of grievance and protest on one of the major public issues of our time." *Id.* at 271. Against the background of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *id.* at 270, the Court reasoned that traditional state libel laws "compelling the critic of official conduct to guarantee the truth of all his factual assertions" [16] would "dampen[] the vigor and limit[] the variety of public debate" by deterring true as well as false speech, *id.* at 279. Accordingly, after noting that "erroneous statement is inevitable in free debate," the Court decided "it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72 (citation omitted). The "actual malice" standard was adopted to serve this function.

Over the next two decades, the Court "'struggle[d] . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment.'" *Hepps*, 475 U.S. at 768 (quoting *Gertz*, 418 U.S. at 325). During this period, the Court "varied its formulations of underlying policy and . . . first expanded, then shrunk the quantum of deference to First Amendment considerations." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 587 (1st Cir. 1980). Nonetheless, at this stage, certain "black letter" rules have emerged. When the plaintiff is a public official or a "public figure" and the speech is of public concern, he must prove by clear and convincing evidence that the defamatory falsehood was made with "actual malice" by a media defendant. *See Gertz*, 418 U.S. at 335-37 & n.7; *see also Hepps*, 475 U.S. at

[16] Under Alabama law, a defendant in a libel action could escape liability by proving the truth of the statement.

775. In such situations, the plaintiff must prove the falsity of the statements to prevail.[17] *Id.* at 775 (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), and *Herbert v. Lando*, 441 U.S. 153, 176 (1979)). When the plaintiff is a private figure but the speech involves a matter of "public concern," the states may define for themselves the appropriate standard of liability; however, they may not impose liability without fault, nor allow presumed or punitive damages without a showing of actual malice. *See Gertz*, 418 U.S. at 347-49; *see also Dun & Bradstreet*, 472 U.S. at 756 (limiting rule of *Gertz* to speech involving issue of public concern). In such instances, the plaintiff must prove the falsity of the speech to recover damages from a media defendant. *Hepps*, 475 U.S. at 777. In contrast, when the plaintiff is a private figure and the speech regards matters of "purely private concern," the plaintiff may prove presumed and punitive damages without a showing of "actual malice." *Dun & Bradstreet*, 472 U.S. at 761; *see Hepps*, 475 U.S. at 775.

In arriving at these rules, the Court articulated the conceptual framework underlying its decisions. *New York Times*, the Court explained, represents an accommodation between the state interest in protecting the reputations of individuals and the First Amendment interest in safeguarding freedom of speech. *See Dun & Bradstreet*, 472 U.S. at 756-57; *Gertz*, 418 U.S. at 349 ("we are attempting to reconcile state law with a competing interest grounded in the . . . First Amendment"); *see also Hepps*, 475 U.S. at 773-74 (implicitly endorsing *Gertz* balancing test).

In evaluating these competing interests, the Court has determined that the state has only a "limited" interest in compensating public persons for injury to reputation by defamatory statements, but has a "strong and legiti-

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[17] Because of our disposition in this case, we need not address the necessity for, nor standard of, proof of falsity.

mate" interest in compensating private persons for the same injury. *See Gertz*, 418 U.S. at 343 & 348-49. The Court has provided a two-fold explanation for the discrepancy in the extent of the state interests. First, because public officials and public figures enjoy "greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals," the states have a greater interest in protecting private persons whose relative lack of "self-help" remedies render them "more vulnerable to injury." *Id.* at 344. Second, the state has a stronger interest in protecting the reputations of private individuals because, unlike public persons, they have not voluntarily placed themselves in the public eye. *Id.* at 344-45.

On the other side of the coin, the "type of speech involved" also affects the way in which the "balance is struck," by varying the weight of the First Amendment interest.[18] *Dun & Bradstreet*, 472 U.S. at 756-57; *cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)

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[18] For fifteen years, the Court fluctuated on the issue whether the nature of the speech involved, in addition to the status of the plaintiff, was a legitimate consideration for triggering heightened constitutional protections. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (plurality opinion) (test for application of actual malice standard turns on "whether the utterance involved concerns an issue of public or general concern"); *Gertz*, 418 U.S. at 346 (application of actual malice standard depends solely on status of plaintiff, not nature of speech, because it is unwise to commit "to the conscience of judges" task of determining " 'what information is relevant to self-government' ") (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)); *Dun & Bradstreet*, 472 U.S. at 757 n.4 (plurality opinion) (opinion turning on "public issue" test, while denying decision was inconsistent with *Gertz*). While few generalizations can safely be propounded, with the Court's most recent defamation decision endorsing the *Dun & Bradstreet* approach, it now appears that a majority of the Court agrees that the nature of the speech is always central to determining the accommodation between First Amendment values and state libel law. *See Hepps*, 475 U.S. at 775.

(identifying "sort of expression involved" as relevant for balancing state interests against First Amendment values). "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet*, 472 U.S. at 758-59 (citations omitted). The Court has determined that "speech of private concern," such as a credit report for business, is of less First Amendment importance, *id.* at 757-59, in the same way that utterances labeled "commercial speech" are "less central to the interests of the First Amendment," *id.* at 758 n.5.

C. *Application of the Rules and Conceptual Framework*

At the outset, we note that it is of no consequence that the defendants (and counterclaim defendants) here are not members of the broadcast and print media. Although the Supreme Court has not finally settled whether "non-media" defendants should receive protections identical to those afforded "media" defendants, *see* L. Tribe, *American Constitutional Law*, § 12-13, at 874 n.9, 876 n.20 (2d ed. 1988),[19] this court has so far declined to limit the protections of the *New York Times* standard to media defendants only, *see Avins v. White*, 627 F.2d 637, 648-49 (3d Cir.) (requiring proof of actual malice when former law school dean sued member of American Bar Association accreditation team for allegedly defamatory remarks made during accreditation evaluation), *cert. denied*, 447 U.S. 982 (1980).

In addition, we do not limit our consideration of the applicability of the *New York Times* standard to the parties claims for defamation alone. The Supreme Court has already applied a similar analysis to other torts, such as intentional infliction of emotional distress,

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[19] *Compare Dun & Bradstreet*, 472 U.S. at 773 & 783-84 (at least one concurring justice and four dissenting justices reject significance of media status) *with Hepps*, 475 U.S. at 777 ("a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant").

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988), and "false light," *Time, Inc. v. Hill*, 385 U.S. 374, 390-91 (1967). *Cf. Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984) (in case involving district court conclusion that "the *New York Times* rule should be applied to a claim of product disparagement," the Supreme Court "express[ed] no view on that ruling, but . . . accepted it for purposes of deciding th[e] case"). *But see Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578-79 (1977) (First Amendment does not limit state's ability to protect performer's commercial stake in act by allowing damage action for violations of common law "right to publicity").

We next turn to assessing the relative weight of the First Amendment interests in this case. We recognize that traditional defamation analysis usually begins with an examination of the status of the plaintiff. *See, e.g., Hepps*, 475 U.S. at 775. Because of the facts presented, however, we shall first consider the content of the speech involved. Nor do we believe that such inverted analysis is improper. *Cf. Hepps*, 475 U.S. at 773-74 (*Gertz* recognized that state interest in compensating individuals—in addition to First Amendment interest in preventing self-censorship—must be weighed in defamation cases, implying that initial analysis of speech not improper); *Dun & Bradstreet*, 472 U.S. at 756 (in *Gertz* "the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*," implying that initial consideration of expression not improper).

Similarly, traditional defamation analysis would have us consider the public or private nature of the speech in assessing the weight of the First Amendment interests. We believe, however, that the novel facts here require a different approach. Our appraisal of these interests depends on whether the speech at issue can properly be

characterized as commercial speech.[20] "There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'" *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). If the speech here is commercial speech, then it likely does not mandate heightened constitutional protection.[21]

We recognize that the Supreme Court cases creating the commercial speech doctrine all involve some form of government regulation of speech and that none involve defamation actions. Further, the focus in the commercial speech cases is on First Amendment protection itself, not the heightened protection afforded by the actual malice standard. However, we believe the subordinate valuation

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[20] Commercial speech was considered to be devoid of First Amendment significance until 1975. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981) (citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)). In 1976, the Court held—in *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)—that speech that does no more than propose a commercial transaction still "enjoys a substantial degree of First Amendment protection." *Metromedia, Inc.*, 453 U.S. at 505. The Court explained:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Virginia Pharmacy Bd., 425 U.S. at 765 (citations omitted).

[21] Although we can "contemplate public controversies arising from commercial conduct" that might necessitate a different result, *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 590-91 (1st Cir. 1980), we do not find that here.

of commercial speech is not confined to the government regulation line of cases.

In *Dun & Bradstreet*, the Court held that speech on matters of private concern, such as a credit report for business, receives less First Amendment protection than speech on matters of public concern. 472 U.S. at 757-59. More significantly for our purposes, the Court justified its decision to allow less protection for speech of private concern by drawing an analogy to the reduced First Amendment protection afforded commercial speech:

> This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. . . . In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik, supra*, at 456; *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 562-563 (1980).

Id. at 758 n.5.

Similarly, the *New York Times* decision indicated that the importance of the First Amendment interests in defamation actions would be reduced in the commercial speech context. In that case, the Court considered the contention that "the constitutional guarantees of freedom of speech . . . are inapplicable here . . . because the allegedly libelous statements were published as a part of a

paid, 'commercial' advertisement." [22] *New York Times*, 376 U.S. at 265. While the Court ultimately determined that the speech was properly characterized as an "editorial" rather than a "commercial" advertisement and therefore deserving of heightened constitutional protection, *id.* at 266, its analysis indicates that commercial speech, in a libel suit, would receive some, albeit less than heightened, constitutional protection.

Before proceeding further, we must consider what qualifies as "commercial speech." Since deciding *New York Times*, the Supreme Court has provided substantial guidance.[23] Commercial speech may be broadly defined as

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[22] In so arguing, Sullivan relied on *Valentine v. Chrestensen*, 316 U.S. 52 (1942), which held that commercial speech receives no constitutional protection. As noted, not until a decade after *New York Times* did the Court expressly extend First Amendment protection to commercial speech. *See Virginia Pharmacy Bd.*, 425 U.S. at 755-70.

[23] As we have noted, the Supreme Court cases on commercial speech all involve some form of government regulation of speech. *See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (Puerto Rican statute prohibiting local casinos from advertising their gambling facilities to Puerto Rican residents); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (regulation of attorney advertisements by state bar association); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (federal statute prohibiting mailing of unsolicited advertisements for contraceptives); *In re R.M.J.*, 455 U.S. 191 (1982) (regulation of attorney advertisements by state supereme court); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (city ordinance prohibiting "off-premise" advertising, unless permitted by one of twelve specified exceptions); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (state statute prohibiting utility company advertisements promoting use of electricity); *Friedman v. Rogers*, 440 U.S. 1 (1979) (state statute prohibiting the practice of optometry under a trade name); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (state-authorized bar association regulation of in-person solicitation of clients by attorney); *Bates v. State Bar*, 433 U.S. 350 (1977) (state supreme court rule prohibiting attorneys from advertising); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (town ordinance prohibiting posting of real

expression related to the economic interests of the speaker and its audience, generally in the form of a commercial advertisement for the sale of goods and services. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). The Supreme Court has cited three factors to consider in deciding whether speech is commercial: (1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech. *Bolger*, 463 U.S. at 66-67. An affirmative answer to all three questions provides "strong support" for the conclusion that the speech is commercial. *Id.* at 67; *accord American Future Sys., Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 862 (3d Cir. 1984), *cert. denied*, 473 U.S. 911 (1985). Stated succinctly, the "commercial speech doctrine rests heavily on 'the common sense distinction between speech proposing a commercial transaction . . . and other varieties of speech.'" *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)).

The Court has elaborated on the reasons why commercial speech receives less than heightened protection. First, commercial speech generally makes a different contribu-

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estate "For Sale" and "Sold" signs); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (state statute declaring advertisement of prescription drug prices by licensed pharmacist to be unprofessional conduct); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (Virginia statute making it a misdemeanor, by sale or circulation of any publication, to encourage procurement of abortion); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (city ordinance prohibiting sex discrimination applied to newspaper employment advertisements published under headings designating job preference by sex); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (municipal ordinance forbidding street distribution of printed handbills bearing commercial advertising).

tion to the exposition of ideas.[24] *Compare Dun & Bradstreet*, 472 U.S. at 762 (holding private speech of reduced constitutional dimension partly because it was "solely in the individual interest of the speaker and its specific business audience") (citing *Central Hudson*, 447 U.S. at 561) *with Central Hudson*, 447 U.S. at 561 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"). In short, "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising . . . ." *Central Hudson*, 447 U.S. at 563.

Second, commercial speech tends to be more durable than other types of speech. As the commercial speaker has an economic self-interest in dissemination, there is little likelihood of the speech being chilled by proper regulation. *Id.* at 564 n.6; *Bates v. State Bar*, 433 U.S. 350, 381 (1977). This attribute, the Court concluded, "may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker." *Virginia Pharmacy Bd.*, 425 U.S. at 772 n.24; *see Dun & Bradstreet*, 472 U.S. at 758 n.5, 762 & n.8 (discussing durability "to show how many of the same concerns that argue in favor of reduced constitutional protection" in regulation of commercial speech actions apply to defamation actions involving private speech).

Third, commercial speakers have extensive knowledge of both their market and their own products. Consequently, they are uniquely situated to evaluate the truthfulness of their speech. *Central Hudson*, 447 U.S. at 564 n.6; *Bates*, 433 U.S. at 381; *see Virginia Pharmacy Bd.*,

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[24] At the same time, we recognize that commercial speech "is indispensable to the proper allocation of resources in a free enterprise system [and therefore] to the formation of intelligent opinions as to how that system ought to be regulation or altered." *Virginia Pharmacy Bd.*, 425 U.S. at 765. Moreover, as we have noted, we can envision advertising that would address public issues in such a way as to necessitate heightened protection. *Cf. New York Times*, 376 U.S. at 266.

425 U.S. at 772 n.24; *see also Dun & Bradstreet*, 472 U.S. at 758 n.5, 762 & n.8 (discussing objective verifiability "to show how many of the same concerns that argue in favor of reduced constitutional protection" in regulation of commercial speech actions apply to defamation actions involving private speech).

The fourth reason is extrinsic. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U.S. at 456.

In this case, affirmative answers to all three prongs of the *Bolger* test provide "strong support" for our conclusion that the statements here are commercial in nature. First, there is no question that they are advertisements; they were disseminated as part of an expensive, professionally run promotional campaign.[25] Second, the speech specifically refers to a product; it touts the relative merits of Personal Choice (or U.S. Healthcare's HMO) over competing products. Third, the desire for revenue motivated the speech; the record contains abundant evidence that Blue Cross/Blue Shield launched the promotional

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[25] That these are advertisements, while a fact that supports the conclusion they should receive less First Amendment protection under *Bolger*, is not by itself dispositive. *New York Times*, 376 U.S. at 266 ("if the allegedly libelous statements would otherwise be constitutionally protected from [a defamation] judgment, they do not forfeit that protection because they were published in the form of a paid advertisement") (footnote omitted). Rather, the significance of speech as advertisement is that "advertising is the *sine qua non* of commercial profits." *Virginia Pharmacy Bd.*, 425 U.S. at 772 n.24. *Compare New York Times*, 376 U.S. at 266 (advertisement soliciting financial support for political cause "not a 'commercial' advertisement") *with Zauderer*, 471 U.S. 637 & n.7 (advertisement containing information that, in another context would be fully protected, nonetheless commercial speech, as it proposed commercial transaction in advertiser's self-interest).

campaign in order to recoup its share of the health insurance market. The trial testimony of Blue Cross/Blue Shield's president plainly states that the aggressive Personal Choice promotional campaign was developed for the express purpose of competing with HMOs. Moreover, Blue Cross/Blue Shield concedes that it developed a series of advertisements to introduce and increase the attractiveness of its products. Similarly, protection of its new market share motivated U.S. Healthcare's speech. In short, "common sense" informs us that the statements here propose a commercial transaction, and thus differ from other types of speech.

Even more importantly, we find it significant that the advertisements have all of the characteristics that the Supreme Court has identified in the commercial speech cases as making speech durable, not susceptible to "chill." Consequently, they do not require the heightened protection we extend to our most valuable forms of speech. Because the thrust of all of the advertisements is to convince the consuming public to bring its business to one of these health care giants rather than the other, there is no doubt that the advertisements were motivated by economic self-interest. Furthermore, given the size of the health care market in the Delaware Valley—Blue Shield virtually shouts about the hundreds of millions of dollars at stake—we believe it would have to be a cold day before these corporations would be chilled from speaking about the comparative merits of their products. *Cf. Dun & Bradstreet*, 472 U.S. at 762-63 (because credit report was solely motivated by profit "any incremental 'chilling' effect of libel suits would be of decreased significance").

In addition, these are advertisements for products and services in markets in which U.S. Healthcare and Blue Cross/Blue Shield deal—and, presumably, know more about than anyone else. *Virginia Pharmacy Bd.*, 425 U.S. at 772 n.24. The facts upon which the advertisements are based—comparative price, procedures, and services offered—are readily objectifiable. These advertise-

ments were precisely calculated, developed over time and published only when the corporate speakers were ready. Consequently, the advertisements were unusually verifiable.

Finally, while the speech here does discuss costs and consequences of competing health insurance and health care delivery programs, some of the advertisements capable of defamatory meaning here add little information and even fewer ideas to the marketplace of health care thought.[26] The expression in these advertisements "differs markedly from ideological expression because it is confined to the promotion of specific . . . services." *Virginia Pharmacy Bd.*, 425 U.S. at 780. *Cf. Zauderer*, 471 U.S. at 637 & n.7 (advertisement containing information that, in another context would be fully protected, nonetheless commercial speech, as it proposed commercial transaction in advertiser's self-interest). And to the extent that the advertisements are false statements of fact, of course, the speech has no constitutional value at all. *Central Hudson*, 447 U.S. at 563.

It is important to note that we do not have a situation in which a corporation addresses an issue of public concern involving a competitor, but does so with speech that is neither commercial nor chill resistant. We simply recognize here, as the Court has in a similar context, that

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[26] We believe one such advertisement implicates important health care concerns. This advertisement suggests that HMO primary care physicians have a financial incentive to deny referrals to specialists. On the other hand, we believe the other advertisements capable of defamatory meaning make no such contribution. One portrays a woman grieving that the hospital to which HMO sent her was inadequate. The second, a "death" scene, shows a pair of hands pulling a hospital sheet over a personal choice [sic] brochure as a dirge plays. "There is simply no credible argument that this type of [advertisement] requires special protection to ensure that 'debate on public issues [will] be uninhibited, robust, and wide-open.'" *Dun & Bradstreet*, 472 U.S. at 762 (quoting *New York Times*, 376 U.S. at 270).

"[a] company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar protection when such statements are made in the context of commercial transactions." *Bolger*, 463 U.S. at 68 (footnote omitted).

Despite these conclusive indications that the speech here is commercial in nature, Blue Cross/Blue Shield argues that the speech should be accorded heightened constitutional protection. Relying on *Bigelow v. Virginia*, 421 U.S. 809 (1975), it argues that speech which does more than "simply propose a commercial transaction" constitutes something more than commercial speech. Furthermore, it maintains that the "*Bigelow* standard" is applicable when the products are not merely linked to a public debate but are themselves "at the center of the public debate."[27] Blue Cross/Blue Shield concludes that its own advertisements "educate[d] the public about the substantial differences among the[] available means for financing and delivering health care, thereby ensuring informed purchasing decisions" and rendering the advertisements non-commercial.

Notwithstanding Blue Cross/Blue Shield's call for application of the "*Bigelow* standard," we believe the *Central Hudson* decision, in which the Supreme Court expressly rejected such attempts to "blur further the line the Court has sought to draw in commercial speech cases," 447 U.S. at 563 n.5, represents the proper approach. *Central Hudson*, prevents an advertiser from

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[27] In *Bigelow*, a newspaper editor published an abortion clinic's advertisement, which the state court determined violated a state criminal statute prohibiting dissemination of publications encouraging the processing of an abortion. The Supreme Court struck down the statute on First Amendment grounds, 421 U.S. at 818-22, stating that the advertisement could not be regulated as commercial speech because, "[v]iewed in its entirety, [it] conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered . . . ," *id.* at 822.

immunizing, in effect, otherwise defamatory speech—behind the actual malice standard afforded to core speech by the First Amendment—simply by reference to an issue of public concern.

In *Central Hudson*, the Court held that a regulation by a state public utility commission which prohibited an electric utility from advertising to promote the use of electricity constituted an improper regulation of commercial speech in violation of the First Amendment. In a concurring opinion, Justice Stevens maintained that the regulation at issue encompassed more than mere "commercial speech" because it would stifle, for example, advertising that promoted consumption of electricity by touting its environmental benefits, and thus would "curtail[] expression by an informed and interested group of persons of their point of view on questions relating to the production and consumption of electrical energy—questions frequently discussed and debated by our political leaders." 447 U.S. at 581 (Stevens, J., concurring). The *Central Hudson* majority was unconvinced:

> Apparently the [concurring] opinion would accord full First Amendment protection to all promotional advertising that includes claims "relating to . . . questions frequently discussed and debated by our political leaders." . . .
>
> Although this approach responds to the serious issues surrounding our national energy policy as raised in this case, we think it would blur further the line the Court has sought to draw in commercial speech cases. It would grant broad constitutional protection to any advertising that links a product to a current public debate. But many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or *individual health and safety*. We rule today in *Consolidated Edison Co. v. Public Service Comm'n.*, [447 U.S. 530 (1980)], that utilities enjoy the full panoply of First

> Amendment protections for their direct comments on public issues.
>
> *There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions.*

Central Hudson, 447 U.S. at 562 n.5 (emphasis added).

Similarly, in *Bolger*, the Court held "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Bolger*, 463 U.S. at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5). Reasoned the Court: "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Id.*

Finally, in *Zauderer*, the Supreme Court reiterated its holding that commercial advertisements do not qualify for heightened First Amendment protection simply because they include statements about issues of public debate and concern. Zauderer was a lawyer sanctioned by the disciplinary committee of the state supreme court for running deceptive newspaper advertisements for his services. Because some of the advertisements, which publicized the lawyer's willingness to represent women who had suffered injuries resulting from their use of the Dalkon Shield contraceptive device, contained statements regarding the legal rights of persons injured by the Dalkon Shield, the Supreme Court recognized that such statements "*in another context*, would be fully protected speech." 471 U.S. at 637 n.7 (emphasis added). "That this is so," the Court concluded, "does not alter the status of the advertisements as commercial speech." *Id.* The Court then restated its position that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* (quoting *Central Hudson*, 447 U.S. at 563 n.5).

We find no principled distinction between the products in *Central Hudson* and those at issue here. Like the energy products advertised in *Central Hudson*, the products advertised here—health care insurance and delivery—are at the center of public debate. Consequently, while we agree that the quality, availability, and cost of health care are among the most important and debated issues of our time, these particular advertisements for specific health care products do not escape the commercial speech category. We conclude, as did the *Zauderer* Court, that whatever the precise boundaries of the "category of expression that may be termed commercial speech, . . . it is clear enough that the speech at issue in this case—advertising pure and simple—falls within those bounds." 471 U.S. at 637.

Therefore, while the speech here is protected by the First Amendment, we hold that the First Amendment requires no higher standard of liability than that mandated by the substantive law for each claim. The heightened protection of the actual malice standard is not "necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

Having concluded that the speech here is commercial speech that does not warrant heightened constitutional protection, we nonetheless proceed to consideration of the nature and weight of the state's interest in compensating individuals for injuries resulting from each of the distinct torts alleged. We have previously discussed the state and federal interests implicated. As we shall see in this case, however, traditional defamation analysis is not well suited to strike the proper balance between the state and federal interests and First Amendment values in the context of commercial speech.

In weighing the state interest, we must look to the status of the claimants. *See Gertz*, 418 U.S. at 342-45; *see also Dun & Bradstreet*, 472 U.S. at 756. As we have

noted, the Court has determined that the state has only a "limited" interest in compensating public persons for injury to reputation but has a "strong and legitimate" interest in compensating private persons for the same injury. *See Gertz*, 418 U.S. at 343, 348-49. Contending that the actual malice standard applies because a public figure is implicated, Blue Cross/Blue Shield argues that the following factors render U.S. Healthcare a "public figure": it has voluntarily exposed itself to public comment on the issues involved in this dispute; it is a contributor to the ongoing debate concerning health care insurance; it is among the nation's largest providers of HMO-type insurance coverage; it markets its products extensively and aggressively, and has a substantial annual advertising budget; and it frequently and consistently asserts the advantages of its method of health care financing and delivery, and has done so in advertisements, press releases, professional journals, newspapers, magazines and speeches before public assemblies. These activities, Blue Cross/Blue Shield submits, "constitute a voluntary effort to influence the consuming public." Similar statements can be made regarding Blue Cross/Blue Shield.

Gertz identified three classes of public figures: those who achieve such stature or notoriety that they are considered public figures in all contexts; those who become public figures involuntarily, but these are "exceedingly rare"; and those who are deemed public figures only within the context of a particular public dispute. *Id.* at 345. The Court defined the last group, limited purpose public figures, as individuals who voluntarily "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.*

At the outset, we note that "the classification of a [claimant] as a public or private figure is a question of law to be determined initially by the trial court and

then carefully scrutinized by an appellate court." *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1081 n.4 (3d Cir.) (citations omitted), *cert. denied*, 474 U.S. 864 (1985). Because neither claimant explicitly classified the other as a full purpose or involuntary public figure, the issue is whether either constitutes a limited purpose public figure.

Generally, two factors inform this determination. The first factor indicative of a claimant's status is his relative access to the media. Clearly, both parties have access to the media. Moreover, the magnitude of the advertising campaigns shows their ability to utilize it on a vast scale. While access to the media does not always make one a public figure for purposes of First Amendment analysis,[28] the tremendous ability of these parties to advertise, indicating their lack of vulnerability, would support a finding that both are public figures.

The second factor is the manner in which the risk of defamation came upon them. Both companies, attempting to influence consumers' decisions, have thrust themselves into the controversy of who provides better value in health care delivery and insurance. Blue Cross/Blue Shield began the comparative advertising war with its pointed attacks on HMO. U.S. Healthcare, even before respond-

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[28] If access to the media were the sole criterion, then Mary Alice Firestone—who held press conferences during her divorce proceedings—would have been a public figure. The Court held that she was not:

> Nor do we think the fact that respondent may have held a few press conferences during the divorce proceedings in an attempt to satisfy inquiring reporters converts her into a "public figure." . . . [T]here is no indication that she sought to use the press conference as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution.

Time, Inc. v. Firestone, 424 U.S. 448, 454 n.3 (1976) (citing *Gertz*, 418 U.S. at 345).

ing with its own comparative advertising, had used advertising to help establish itself as a leading provider of health care in the Delaware Valley. Consequently, by inviting comment and assuming the risk of unfair comment, both claimants resemble public figures. *See Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980) ("In short, through its advertising blitz, [the plaintiff corporation] invited public attention, comment and criticism.").

Under the traditional defamation analysis, the parties' considerable access to the media and their voluntary entry into a controversy are strong indicia that they are limited purpose public figures.[29] Indeed, inflexible application of these factors would warrant a finding of public figure status and facilitate a finding of heightened con-

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[29] Indeed, we have held a corporation with such characteristics a limited purpose public figure. *See, e.g., Steaks*, 623 F.2d at 272. In *Steaks*, a corporation which had been selling discount meat from booths in Pittsburgh-area department stores brought a defamation action against a Pittsburgh television station for a report it aired. The news report claimed that the corporation was misrepresenting the price and quality of its beef. Noting that the corporation had, "through its advertising blitz, . . . invited public attention, comment, and criticism," *id.* at 274, and that the beef had aroused numerous complaints from area customers, *id.*, we held the corporation a public figure, *id.* at 272.

Steaks does not control our decision here, however. *Steaks* involved a consumer reporter's statement, not a comparative advertising campaign. The parties apparently conceded that the news broadcast addressed a matter of public concern, and the court concurred, disposing the issue in a brief phrase. *Id.* In its conclusion, the court was careful to state that its decision reflected the need to protect such speech:

> Regardless whether particular statements made by consumer reports are precisely accurate, it is necessary to insulate them from the vicissitudes of ordinary civil litigation in order to foster . . . First Amendment goals . . . .

Id. at 280. Clearly, the statements in *Steaks* did not constitute commercial speech.

stitutional protection. Nonetheless, we hold that these corporations are not public figures for the limited purpose of commenting on health care in this case.[30]

As noted, *Gertz* defines the limited purpose public figure as one who has "thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." 418 U.S. at 345. Although some of the advertisements touch on matters of public concern, their central thrust is commercial. Thus, the parties have acted primarily to generate revenue by influencing customers, not to resolve "the issues involved."

While discerning motivations of the speaker is often difficult, we have a more fundamental reason for declining to find limited purpose public figure status in this case. The express analysis in *Gertz* is not helpful in the context of a comparative advertising war. Most products can be linked to a public issue. *See Central Hudson*, 447 U.S. 563 n.5. And most advertisers—including both claimants here—seek out the media. Thus, it will always be true that such advertisers have voluntarily placed themselves in the public eye. It will be equally true that such advertisers have access to the media. Therefore, under the *Gertz* rationale, speech of public concern that implicates corporate advertisers—i.e., typical comparative advertising—will always be insulated behind the actual malice standard. *Cf. Curtis Publishing Co. v. Butts*, 388 U.S. 130, 134-35 & 162-65 (1967) (Warren, C.J., concurring). We believe a corporation must do more than the claimants have done here to become a limited purpose public figure under *Gertz*.[31]

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[30] Our holding comports with the Supreme Court's reluctance to "constitutionalize the entire common law of libel." *Dun & Bradstreet*, 472 U.S. at 761 n.7.

[31] We find it significant that the Supreme Court recognized in *Gertz* that "it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority." 418 U.S. at 344.

In summary, we conclude that the speech at issue does not receive heightened protection under the First Amendment. Because this speech is chill-resistant, the *New York Times* standard is not, as we have noted, "necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). Therefore, the standard of proof needed to establish the substantive claims is that applicable under federal and state law.

For these reasons, we hold that the district court erred in applying the *New York Times* standard to the claims in this case and in directing entry of judgment under Fed. R. Civ. P. 50(b). Accordingly, we will reverse the judgment of the district court and remand for proceedings consistent with this opinion.

IV.

THE JURY ISSUE

Blue Cross/Blue Shield contends that the district court erred by requiring the jury to continue to deliberate after indications that it was deadlocked, and by reconstituting the jury after the court had declared a mistrial and held an open-court colloquy with the jurors.

A.

The jury deliberated for eight days in this case. During that period, on four different occasions it sent notes to the court stating that it was deadlocked. On the morning of the eighth day, after the jury had sent the third of these notes, the court delivered a modified *Allen* charge,[32] properly instructing the jury:

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[32] *Allen v. United States*, 164 U.S. 492 (1896). The Supreme Court recently reaffirmed *Allen*'s validity, especially when the charge, as here, does not speak specifically to minority jurors. *Lowenfield v. Phelps*, 484 U.S. 231, 237-38 (1988).

> It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment.
>
> Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors.
>
> In your deliberations do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of the evidence solely because of any comments made by the Court or because of any opinion of your fellow jurors or for the mere purpose of returning a verdict.

Approximately two hours later, the jury sent its fourth note to the court, which stated, "[w]e are unable to reach a unanimous decision on question 1 [sic] of the charge." At that point, the district court recalled the jury, declared a mistrial and told the jury "[t]his trial is over; you can sit back and relax." Then, however, the district court made the following request of the jury:

> It might be helpful to the lawyers to know what your thoughts were about the case if you wish to express them. You shouldn't feel any pressure but it might be interesting for the lawyers to know what your problems with the case were on one side or the other.

Thereupon, a lively colloquy ensued in open court for approximately forty-five minutes, during which several jurors gave lengthy explanations of their thoughts and how the jury had proceeded through its deliberations. At one point, the district court specifically inquired as to the numerical division of the jury.

Eventually, it became clear that at least four of the eight jurors agreed on Interrogatory 1B, which asked whether Blue Cross/Blue Shield could recover from U.S.

Healthcare on any of its counterclaims. In view of this, U.S. Healthcare's attorney made a motion for the jury to be reconstituted to see if it could reach a verdict on Interrogatory 1B only. Despite the fact that no clear agreement among all of the jurors had been revealed and, more importantly, that the jurors had engaged in the colloquy on the understanding that the trial was over, the district court vacated his declaration of a mistrial and instructed the jury to retire once again to see if it could reach a verdict on Interrogatory 1B. Within ten minutes, the jury returned a verdict in favor of U.S. Healthcare and against Blue Cross/Blue Shield on Interrogatory 1B.

B.

Our review of Blue Cross/Blue Shield's contention that the jury was coerced requires that we consider the supplemental communication between the district court and the jury "in its context and under all the circumstances." *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (per curiam). We do not believe that the jury was misled by the district court's supplemental instructions. However, we believe that the jury was improperly reconstituted and, therefore, we will vacate entry of judgment against Blue Cross/Blue Shield on its counterclaims.

This was a lengthy and contentious trial and, as in all trials of this nature, it was proper for the district court to have an interest in bringing the matter to a satisfactory conclusion. Thus, we are sympathetic to the motivations that no doubt led the district judge to reconstitute the jury. Nevertheless, we believe the trial had been terminated. The trial judge had declared a mistrial, and invited and received detailed explanations from the jurors on their respective views. The jurors' responses made clear that no consensus had ever been reached on any of the interrogatories. One of the first jurors to speak stated that "[w]e had to stop because they were never unanimous on all of the elements." When the dis-

trict court asked the jury specifically whether it would be "useful for you to resume your deliberations with a view of seeing whether you could decide [Interrogatory 1B]," the first juror to answer replied that the "[h]onest opinion of this group is that we reached a point where I doubt if we could agree black was black." Moreover, the jurors shared their thoughts with the court, the attorneys, and their fellow jurors on the understanding that the trial was terminated and they would no longer have to face one another in the jury room. Indeed, there were jurors who took a public stand on the merits of issues about which they were thereafter asked to deliberate. These events having taken place, the jury could not have been reconstituted.

In addition, the trial judge asked the jurors how they were divided. The Supreme Court has cautioned against asking a deadlocked jury how it is divided: "We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. . . . [I]n general its tendency is coercive." *Brasfield v. United States*, 272 U.S. 448, 450 (1926); *accord Virgin Islands v. Romain*, 600 F.2d 435, 436-37 (3d Cir. 1979).[33]

Consequently, we will reinstate Blue Cross/Blue Shield's counterclaims.

V.

ABUSE OF PROCESS COUNTERCLAIM

Blue Cross and Blue Shield both counterclaimed for abuse of process under Pennsylvania law in response to

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[33] Our decision in *United States v. Fiorilla*, 850 F.2d 172 (3d Cir.), *cert. denied*, 109 S. Ct. 492 (1988), is not to the contrary. In *Fiorilla* the jury was polled after it had reported reaching a unanimous verdict. As we observed in *Fiorilla*, unlike the trial judge's pre-verdict inquiry in *Brasfield*, jury polling after a verdict is "both a necessary and useful device for preserving a defendant's right to a unanimous verdict." *Fiorilla*, 850 F.2d at 176 (citing *United States v. Brooks*, 420 F.2d 1350, 1353 (D.C. Cir. 1969)).

U.S. Healthcare's original suit in the Court of Common Pleas. On motion by U.S. Healthcare, the district court dismissed the abuse of process counts in their counterclaims in two concurrent orders, citing *McGee v. Feege*, 353 Pa. Super. 595 (1986); and *Sheridan v. Fox*, 531 F. Supp. 151 (E.D. Pa. 1982). These decisions hold that in order to state a cause of action for abuse of process under Pennsylvania law, the plaintiff must suffer either an arrest or a seizure of property. *McGee*, 353 Pa. Super. at 598; *Sheridan*, 531 F. Supp. at 154. As neither Blue Cross nor Blue Shield had made such allegations, it seems apparent that lack of an arrest or seizure of property was the district court's basis for dismissing the counterclaims.

After the district court's action, however, the Superior Court's decision in *McGee* was reversed by the Pennsylvania Supreme Court. *McGee v. Feege*, 517 Pa. 247 (1987). The Supreme Court expressly rejected the requirement of arrest or seizure of property to maintain an action for abuse of process under Pennsylvania law. *Id.* at 254-59.

In these situations, an appellate court usually applies the law in effect at the time it renders its decision. *Bradley v. School Bd.*, 416 U.S. 696, 714 (1974) (quoting *Thorpe v. Housing Auth.*, 393 U.S. 268, 281 (1969)).[34] Therefore, we will reverse the district court and reinstate

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[34] We recognize that intervening changes of law are not always applied retroactively to cases on appeal. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987). Before a court can limit application of a judicial decision to future cases only, it must consider three factors: 1) whether the decision establishes "a new principle of law . . . by overruling clear past precedent on which litigants may have relied"; 2) whether retroactive operation comports with the purpose of the underlying rule; and 3) whether retroactive application is inequitable. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). We have considered these factors and find retroactive operation of the new law appropriate in this case.

the abuse of process counts of the Blue Cross/Blue Shield counterclaims.

VI.

CONCLUSION

The parties throughout their briefs raise several other points on appeal. Having considered them, we find they are either rendered moot by our holding or are devoid of merit.

For the reasons discussed, we will reverse and remand for proceedings consistent with this opinion.

Each side to bear its own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 86-6452

U.S. HEALTHCARE, INC., UNITED STATES HEALTH CARE SYSTEMS OF PENNSYLVANIA, INC. and HEALTH MAINTENANCE ORGANIZATION OF NEW JERSEY, INC.

v.

BLUE CROSS OF GREATER PHILADELPHIA,
PENNSYLVANIA BLUE SHIELD and
DAVID S. MARKSON

MEMORANDUM

Marvin Katz, J. March 4, 1988

The court has the following motions before it: the Motion of Defendants to Vacate the Jury's Determination in Respect of Jury Interrogatory No. 1(B) or, in the Alternative, for Entry of Final Judgment Pursuant to Rule 54(b) and a Stay of the February 22, 1988 Retrial Pending Appellate Review of the Validity of the Jury's Determination; the Motion of Defendants Blue Cross of Greater Philadelphia and Pennsylvania Blue Shield for a New Trial on Their Counterclaims or, in the Alternative, for the Entry of Final Judgment Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and for a Stay of Any Retrial of Plaintiffs' Claims; the Defendants' Motion for Entry of Judgment Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure; the Motion of Defendants to Vacate Award of Costs in Favor of Plaintiffs; the Motion of Defend-

ant David S. Markson to Alter or Amend the Judgment on the Verdict Entered on February 11, 1988 to Vacate the Award of Costs on the Counterclaim; the Plaintiffs' Motion for Severance and to Set Trial Date; the Plaintiffs' First Alternative Motion for Certification Pursuant to 28 U.S.C. § 1292(b); and the Plaintiffs' Second Alternative Motion for Entry of Judgment in Favor of Plaintiffs and Against Defendants on Plaintiffs' Affirmative Claims.

In July of 1986, the defendants,[1] who provide health insurance products and services, introduced a new product known as Personal Choice. The defendants had designed Personal Choice to be an alternative to traditional health maintenance organizations. The plaintiffs are the defendants' chief competitors in the Delaware Valley area, and their principal product is a traditional health maintenance organization known as HMO-Pennsylvania/New Jersey. When the defendants introduced Personal Choice, they promoted it and the insurance products they offer to senior citizens with a new advertising campaign. Most of the advertisements compared the attributes of the defendants' products with those offered by the plaintiffs. Many included the statement, "Better than HMO. So good, it's Blue Cross and Blue Shield." Unfortunately, the defendants decided not to engage in rational discourse about the relative merits of the different insurance plans. Instead, they played upon the fears of health insurance consumers. For example, one of the defendants' television advertisements depicts a woman wringing her hands and tearfully bemoaning the fact that her HMO assigned her to the wrong hospital. The implication is that some tragedy has befallen a loved one as a result. Then a spokesman for the defendants says that people covered by Personal Choice may go to any of their physicians and network hospials.

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[1] Defendant David S. Markson is the president of Blue Cross of Greater Philadelphia.

Not to be outdone, the plaintiffs quickly responded with what they call a "corrective advertising" campaign. It, too, was a reprehensible attempt to exploit the fears of consumers of health insurance products. In one of the plaintiffs' advertisements, for example, the narrator lists the shortcomings of Personal Choice as a dirge plays and the camera pans from a Personal Choice brochure resting on the pillow of a hospital bed to distraught family members standing around the bed. At the end of the advertisement, a pair of hands pull a sheet over the Personal Choice brochure.

In November 1986, the plaintiffs filed their complaint in this case, claiming that they were entitled to damages for the defendants' advertising under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which prohibits false or misleading advertising, as well as under common law theories of defamation, commercial disparagement, and tortious interference with contractual relations. The defendants filed counterclaims based upon the plaintiffs' "corrective advertising" under the same theories of liability.

After seven days of deliberations, the jury reported that it could not reach a verdict, and the court declared a mistrial.[2] The court then questioned the jury about

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[2] The court had previously denied the Joint Motion of All Defendants for a Directed Verdict (January 9, 1988) and the plaintiffs' Motions for a Directed Verdict on the Counterclaims (January 20, 1988). The law was unclear at that point about the standard by which the parties had to prove falsity as part of their defamation claims. It was also unclear about whether the first amendment imposed the requirement of proof of falsity and actual malice as a component of the claims under the Lanham Act and the other common law torts. As this memorandum indicates, in light of the Supreme Court's recent opinion in *Hustler Magazine v. Falwell*, No. 86-1278, slip op., 1988 U.S. LEXIS 941 (24 Feb. 1988), the court has subsequently concluded that the parties must indeed prove falsity and malice by clear and convincing evidence in order to prevail on any of their claims or counterclaims.

the reasons for the deadlock. In the course of that discussion, it became clear that the jury had, in fact, reached a unanimous verdict on the defendants' counterclaims. At that point, the court vacated its declaration of a mistrial and asked the jury to see if they could return a verdict on the defendants' counterclaims. The jury soon returned with its verdict against the defendants. The court entered judgment in favor of the plaintiffs on the counterclaims and scheduled a new trial on the plaintiffs' affirmative claims. The parties filed the motions now before the court.

The Defendants' Motions to Vacate the Jury's Verdict and For a New Trial on Their Counterclaims

The defendants argue that the court coerced the jury to return a verdict against them on their counterclaims. The court, however, merely acted to insure that the jury reported its verdict accurately. *See* Fed. R. Civ. P. 49 (b); *Attridge v. Cencorp*, 836 F.2d 113 (2d Cir. 1987); *Mt. Airy Lodge, Inc. v. Upjohn Co.*, 96 F.R.D. 378 (E.D. Pa. 1982). The court questioned the jurors on the record and did not make any affirmative comments. There is no indication that the court coerced the jurors or that the defendants were prejudiced as a result of these proceedings. *See Rushen v. Spain*, 464 U.S. 114 (1983) (per curiam) (criminal defendant not prejudiced by juror's undisclosed *ex parte* communications with the trial judge); *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983), *cert. denied sub nom. Dentico v. United States*, 468 U.S. 1217 (1984) (defendants not prejudiced by judge's *ex parte* communication with juror because it did not affect verdict). The defendants' arguments about the court's rulings on evidence and the procedure it followed with respect to the parties' points for charge and the jury interrogatories are without merit. Accordingly, the court will deny the defendants' motions.[3]

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[3] The defendants have also made motions in the alternative for entry of final judgment pursuant to Fed. R. Civ. P. 54(b). The

The Defendants' Motion for Entry of Judgment

The first amendment protects both sides' sleazy advertising. Because the parties are public figures in the context of this case,[4] and because the advertisements in question discuss community health issues of public concern, the parties must prove by clear and convincing evidence that the other side published the advertisements with actual malice—that is with knowledge or reckless disregard of their falsity—in order to prevail on their respective defamation claims. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). They must also prove that the statements in the advertisements were false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Although *Hepps* does not discuss the evidentiary standard by which a plaintiff must prove falsity, the court is persuaded that clear and convincing evidence is the appropriate standard. "A clear and convincing standard of proof for falsity would resolve doubts in favor of speech when the truth of a statement is difficult to ascertain conclusively. Indeed, as a practical matter, public-figure plaintiffs already bear such a burden, for in order to prove actual malice they must, of necessity, show by clear and convincing evidence that the defendant knew the statement was false or acted in reckless disregard of its truth." *Robertson v. McCloskey*, 666 F. Supp. 241, 248 (D.D.C. 1987); *see Hustler Magazine v. Falwell*,

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court will enter final judgment because there is no reason to delay appellate review. In light of the court's decision to enter judgment against the plaintiffs on their affirmative claims, the defendants' alternative motions for a stay of the new trial pending appeal are moot.

[4]*See Marcone v. Penthouse Int'l Mag. For Men*, 754 F.2d 1072, 1081-84 (3d Cir. 1985), *cert. denied*, 474 U.S. 864 (1985); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980). Defendant David S. Markson did not assert any counterclaims against the plaintiffs, so there is no need to determine whether he is a public figure for the purpose of first amendment analysis.

No. 86-1278, slip op., 1988 U.S. LEXIS 941 (24 Feb. 1988).

The plaintiffs argue that these heightened evidentiary standards do not apply in the instant case because the advertisements are commercial speech, which is entitled to less first amendment protection than other forms of speech. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). Their argument, however, misconstrues the nature of the dispute that led to this case.

The dispute is about how best to deal with spiraling medical costs. In the current health insurance market, considerations of cost efficiency threaten the traditional practice of payment for individual medical services. Arguably, the HMO concept of medical care distributed by a primary care physician sacrifices some freedom of choice and possibly quality in order to make medical care more affordable. It is also arguable that the traditional fee-for-services approach may build in incentives for inefficient, high costs, which an aging population in an economy of unevenly distributed, scarce resources cannot afford. This debate involves "the free flow of ideas on matters of public interest and concern," which is at the heart of the first amendment. *Falwell*, 1988 U.S. LEXIS 941, at 9. To characterize the advertisements in this case as mere commercial speech ignores the fact that, at their core, they are instruments in a debate between two providers of public health care "intimately involved in the resolution of important public questions." *Falwell*, 1988 U.S. LEXIS 941, at 10 (quoting *Associated Press v. Walker*, decided with *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result)). As Justice Holmes wrote, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*,

250 U.S. 616, 630 (1919) (dissenting op.). It does not matter that the motives for the advertisements were less than admirable, that the advertisements were beyond the bounds of good taste, or even that they were outrageous. They are still entitled to the protection of the first amendment because "the government must remain neutral in the marketplace of ideas." *Falwell*, 1988 U.S. LEXIS 941, at 17-18 (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978)).

The parties' claims of commercial disparagement and tortious interference with contract, as well as their claims under section 43(a) of the Lanham Act, 15 U.S.C. § 1125 (a), are based upon the same advertisements. Consequently, the first amendment requires that the parties prove both falsity and actual malice by clear and convincing evidence in order to recover on these claims.[5] *See Falwell*, 1988 U.S. LEXIS 941; *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 232 Cal. Rptr. 542, 728 P.2d 1117 (1986). *Cf. Brownsville Golden Age Nursing Home, Inc. v. Wells*, No. 87-3552, slip op., 1988 U.S. App. LEXIS 1628 (3d Cir. 9 Feb. 1988). Although the jury could reasonably have concluded that both sides had proven falsity and actual malice by a preponderance of the evidence, neither side has presented clear and convincing evidence of either falsity or malice. For example, the plaintiffs have not proven by clear and convincing evidence that the following statements in the defendants' advertisements were false or published with actual malice:

a. the statements regarding the financial incentives of HMO primary care physicians not to refer patients to specialists;

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[5] The plaintiffs' argument that the first amendment does not apply to their Lanham Act claims is without merit. The first amendment says, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

b. the statements that HMO subscribers must have permission in order to see a medical specialist;

c. the statements about the cost of prescription coverage under HMOs;

d. the statements about the coverage provided by HMOs for care received in hospitals that are not part of the HMO network;

e. the statements about the selection of hospitals for HMO subscribers;

f. the statements about the limitations of coverage under HMOs for emergency care rendered outside the HMO's area;

g. the statements about the relative quality of health care;

h. the statements that HMO members can choose only one physician; and

i. the statements about the number of clients leaving HMO.

Under these circumstances, the court must grant the defendants' motion and enter judgment for the defendants on the plaintiffs' affirmative claims. *See* Fed. R. Civ. P. 50; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2511 (1986); *Flynn v. Bass Bros. Enterprises, Inc.*, 744 F.2d 978, 983 (3d Cir. 1984); *Vander Zee v. Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979).

The Defendants' Motions to Vacate the Award of Costs

Given the court's disposition of this case, each party should bear its own costs. The court, therefore, will grant the defendants' motions and vacate that portion of its order dated February 9, 1988 and entered February 11, 1988 (Document Number 301) that taxed costs against the defendants.

The Plaintiffs' Motions

In light of the court's decision to enter judgment against the plaintiffs on their claims and against the defendants on their counterclaims, the court will deny the plaintiffs' Motion for Severance and to Set Trial Date, their First Alternative Motion for Certification Pursuant to 28 U.S.C. § 1292(b), and their Second Alternative Motion for Entry of Judgment in Favor of Plaintiffs and Against Defendants on Plaintiffs' Affirmative Claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 86-6452

U.S. HEALTHCARE, INC., UNITED STATES HEALTH CARE SYSTEMS OF PENNSYLVANIA, INC. and HEALTH MAINTENANCE ORGANIZATION OF NEW JERSEY, INC.

v.

BLUE CROSS OF GREATER PHILADELPHIA, PENNSYLVANIA BLUE SHIELD and DAVID S. MARKSON

ORDER

AND NOW, this 4th day of March, 1988, upon consideration of the whole record in this case at a hearing and pretrial conference, upon consideration of the motions listed in this order and the responses thereto, and based upon the findings and reasoning in the memorandum that accompanies this order, it is hereby ORDERED as follows:

1. The Defendants' Motion for Entry of Judgment Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure is GRANTED.

2. The Motion of Defendants Blue Cross of Greater Philadelphia and Pennsylvania Blue Shield to Vacate the Jury's Determination in Respect of Jury Interrogatory No. 1(B) and their Motion for a New Trial on Their Counterclaims are DENIED. Their Motions in the Al-

ternative for the Entry of Final Judgment Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and for a Stay of Any Retrial of Plaintiff's Claims are GRANTED in part and DENIED in part. The court will enter final judgment on the defendants' counterclaims. The requests for a stay of any retrial of plaintiffs' claims pending appellate review are DENIED as moot.

3. The Motion of Defendants to Vacate Award of Costs in Favor of Plaintiffs and the Motion of Defendant David S. Markson to Alter or Amend the Judgment on the Verdict Entered on February 11, 1988[1] to Vacate the Award of Costs on the Counterclaim are GRANTED. That portion of the court's order of February 9, 1988 (Document Number 301) that taxed costs against the defendants is VACATED. Each party shall bear its own costs.

4. The Plaintiffs' Motion for Severance and To Set Trial Date is DENIED.

5. The Plaintiffs' First Alternative Motion for Certification Pursuant to 28 U.S.C. § 1292(b) is DENIED.

6. The Plaintiffs' Second Alternative Motion for Entry of Judgment in Favor of Plaintiffs and Against Defendants on Plaintiffs' Affirmative Claims is DENIED.

BY THE COURT:

/s/ Marvin Katz, J.
MARVIN KATZ, J.

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[1] This order was signed on February 9, 1988.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 86-6452

U.S. HEALTHCARE, INC., UNITED STATES HEALTH CARE SYSTEMS OF PENNSYLVANIA, INC. and HEALTH MAINTENANCE ORGANIZATION OF NEW JERSEY, INC.

v.

BLUE CROSS OF GREATER PHILADELPHIA, PENNSYLVANIA BLUE SHIELD and DAVID S. MARKSON

JUDGMENT

AND NOW, this 4th day of March, 1988, judgment is hereby entered for the defendants and against the plaintiffs on all of the plaintiffs' claims. Judgment is also entered in favor of the plaintiffs (counterclaim defendants) and against the defendants (counterclaim plaintiffs) on the defendants' counterclaims in accordance with the jury's verdict, there being no just reason for delay.

BY THE COURT:

/s/ Marvin Katz, J.
MARVIN KATZ, J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1180 and 88-1205

U.S. HEALTHCARE, INC., UNITED STATES HEALTH CARE SYSTEMS OF PENNSYLVANIA, INC. and HEALTH MAINTENANCE ORGANIZATION OF NEW JERSEY, INC.,
Appellants in 88-1180

v.

BLUE CROSS OF GREATER PHILADELPHIA, PENNSYLVANIA BLUE SHIELD and DAVID MARKSON,
Blue Cross of Greater Philadelphia ("Blue Cross") and Pennsylvania Blue Shield ("Blue Shield"),
Appellants in 88-1205

(D.C. Civ. No. 86-6452)

SUR PETITION FOR REHEARING

Present: SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges.*

The petition for rehearing filed by appellants/cross-appellees U.S. Healthcare, Inc., United States Health

Care Systems of Pennsylvania, Inc. and Health Maintenance Organization of New Jersey, Inc. in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ A. J. Scirica
Circuit Judge

Dated: Apr. 4, 1990

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1180 and 88-1205

U.S. HEALTHCARE, INC., *et al.*

VS.

BLUE CROSS OF GREATER PHILADELPHIA And
PENNSYLVANIA BLUE SHIELD, And
DAVID S. MARKSON

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until May 25, 1990.

/s/ A. J. Scirica
Circuit Judge

Dated: Apr. 25, 1990

APPENDIX F

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Plaintiff's Exhibit 255

Introducing Personal Choice

The advantages of HMO
without all the disadvantages.

**Personal Choice.SM New.
Different. Now. Blue Cross
and Blue Shield.**

Personal ChoiceSM is preventive health care protection for people who want HMO-type coverage. But don't want to give up the freedom of choice and security of Blue Cross and Blue Shield.

Personal ChoiceSM keeps you covered. Always. All ways. You get your choice of 6,500 doctors. Specialty hospitals. Medical school hospitals. Community Hospitals. Specialists. Complete physical exams. Routine doctor visits. Complete pediatric care. Prescription drugs. Immunizations. Dental care for children under 12. Emergency and follow-up care. Anytime. Anywhere. Coverage outside our network hospitals.

Personal ChoiceSM gives you all the advantages of HMO. Without all the disadvantages.

Did you know that HMO restricts your choice of doctors. Hospitals. Limits your coverage away from home. Charges extra for their prescription plan. And should you need a specialist, HMO insists you get permission first. You are not allowed to seek the advice of a dermatologist, chiropractor, neurologist, radiologist—any specialist—without your physician's OK.

Now, does that sound OK to you? It doesn't to us either.

Your choice of hospitals

Personal Choice℠ gives you your choice of hospitals. City. Suburban. Specialty. Medical schools. A children's hospital. And one of the most renowned cancer centers in America. Our hospitals provide a full array of health care services: medical, surgical, OB/GYN, same day surgery, and comprehensive outpatient care in a large number of specialties and subspecialties.

Abington Memorial Hospital Acute-care teaching facility in a convenient, attractive suburban setting; specialized facilities for trauma, high risk maternity, intensive infant care.

Brandywine Hospital "The City Hospital in the Country," a full service acute-care facility, with detoxification unit, hemodialysis, air ambulance service, much more.

Delaware County Memorial Hospital Full service, acute care hospital with 60-year tradition of quality personal care and committed to technological innovations and medical progress.

Fox Chase Cancer Center Nationally renowned, Pennsylvania's only facility devoted to comprehensive cancer care and treatment. Physicians in every specialty available for consultation.

Grand View Hospital General, acute-care institution providing personal care to Montgomery-Bucks since 1913--and today.

The Lower Bucks Hospital General, acute-care facility; full range of services, including Delaware Valley's first hospital based Home Care Program.

Methodist Hospital Non-sectarian, community, acute-care teaching facility with wide range of services. Easily accessible throughout the region. Includes only maternity program in South Philadelphia.

Montgomery Hospital Acute-care teaching faciilty serving a growing metropolitan area with a full spectrum of services, including a diabetes treatment center, dialysis

and neonatal care—all administered by caring professionals.

Pottstown Memorial Medical Center General, acute-care facility with broad spectrum of services, including nuclear medicine, laser technology.

Riddle Memorial Hospital Conveniently located in Suburban Delaware County, its medical staff has a broad range of physician specialities. 50 adjacent physician offices add to convenience of this comprehensive health care center.

Rolling Hill Hospital A general, acute-care community hospital with a wide range of services and specialties in a personalized setting. Including maternity program with high risk capability, complete neurovascular services.

Sacred Heart Medical Center 250-bed Catholic Community Medical Center located in Chester offers a complete range of services, more than a quarter century of caring: and committed to medical technological advancements.

St. Christopher's Hospital for Children Non-sectarian children's medical center providing many specialized services. Including the region's only pediatric solid-organ transplantation program and the only burn center for children between Boston and Washington, D.C.

Temple University Hospital Recently opened, completely new health care complex with 504-patient-bed tower and adjacent 450-car garage. Conveniently located on Broad St., minutes from the Roosevelt Blvd. Comprehensive programs in all medical disciplines, nationally recognized medical school faculty using latest diagnostic and therapeutic techniques including heart transplant surgery.

Thomas Jefferson University Hospital One of Philadelphia's largest. Leader in treatment of heart disease, cancer, stroke, injury, birth defects, child birth. Supported by medical school faculty, with an extensive array

of specialized centers and one of 13 federally designated spinal cord injury centers in the U.S. Also renowned for hematological research.

Wills Eye Hospital Nation's oldest and largest specialty eye care facility; over 250 ophthalmologists on staff. General Ophthalmology, Pediatric Ophthalmology, and seven sub-specialty services including Ocular Trauma Center.

Your choice of 6,500 doctors.

Personal Choice℠ gives you your choice of 6,500 Blue Cross and Blue Shield doctors. 6,499 more doctors than HMO lets you choose.

Personal Choice℠ gives you more doctors. More choice. More freedom. You're not restricted to any doctor. Should you decide, for any reason, to change doctors, or go to a specialist, you're free to do so. No questions. No hassles. Just quality health care from individual doctors who belong to Blue Cross and Blue Shield—the most widely accepted medical coverage in the world. Still the standard by which other health care protection has been measured for almost 50 years.

6,500 Personal Choice doctors or one HMO doctor. The choice is yours.

Your choice of specialists.

Personal Choice℠ gives you more than a choice of specialists. It also gives you the freedom to go directly to a specialist.

No asking. No waiting. No worrying.

HMO hands you a list and asks you to select a "primary care" doctor. They then demand you see this

doctor first. You should also know that, through a series of financial incentives, HMO encourages this general practioner to handle as many patients as possible, without referring them to a specialist. When an HMO doctor does make a referral, it could mean money directly out of his pocket. How many doctors do you know who want to pay your doctor's bill?

With Personal Choice℠ you don't have to ask your "primary care" doctor for permission to see a specialist. If you want to see a specialist, get a second opinion. Go.

After all, it's your health. And that means it is your choice.

Emergency and follow-up care. Anytime. Anywhere.

Personal Choice℠ always protects you. No matter where you are. When you're away on vacation, the last thing you need is to find out you're not covered. With Personal Choice℠ there are no surprises. No last minute panics. Just quality protection. When you need it. Where you need it.

Personal Choice℠ also covers any follow-up treatment that may be required. We don't expect you to rush home after an emergency just for follow-up care. Stay where you are. Relax. You're covered.

HMO on the other hand, does not cover follow-up care away from home. HMO has limited protection. Limited security. Limited freedom. And limited peace of mind.

In an emergency situation, your only concern is to get medical attention. And to get it fast. And that's exactly what Personal Choice℠ gives you. Anytime. Anywhere.

Personal Choice.SM will co-pay treatment outside our network of hospitals.

We're always there. Should you decide, for whatever reason, to seek treatment outside our Personal ChoiceSM network of hospitals, we'll co-pay.

HMO won't.

With Personal ChoiceSM, you're never alone. And that's been the Blue Cross and Blue Shield philosophy for almost 50 years. Quality health care. Anytime. All the time. It's the most widely accepted medical coverage you can have. Honored by more doctors, specialists and hospitals than any other in the world.

Personal ChoiceSM. Preventive health care you can live with. And isn't that what it's all about anyway.

Blue Cross and Blue Shield representatives are now contacting your employer with full details on "Personal Choice." For more information ask your employer.

Personal Choice

Better than HMO. So good, it's Blue Cross and Blue Shield.

Blue Cross
Blue Shield

PLAINTIFF'S EXHIBIT 267
[Photo Omitted in Printing]

Senior Citizens

Do you want
the freedom and security
of Blue Cross and
Blue Shield Coverage,
or the risk and uncertainty
of an HMO?

For most of your life, you've trusted Blue Cross and Blue Shield to protect you and your family. Knowing that you were receiving the best medical coverage available made you sleep better at night.

Now, you've turned sixty-five, and you've turned to Medicare plus a Blue Cross and Blue Shield Medicare supplement for that same peace of mind.

Blue Cross and Blue Shield Coverage is the most widely accepted medical protection you can have. It's honored by more doctors, specialists and hospitals than any other plan in the world.

The 65-Special and 65-Gold Medicare supplement plans guarantee senior citizens the finest coverage available at an affordable monthly fee.

Blue Cross of Greater Philadelphia and Pennsylvania Blue Shield are working hard to keep quality health care within everyone's reach. We're a non-profit organization. We turn no one away. And what's more, we'll be here tomorrow.

The limitations of HMO Medicare.

HMO wants you to surrender the freedom of choice you currently enjoy as a Blue Cross and Blue Shield Medicare supplement subscriber for the restrictions of newly formed HMO Medicare plans.

No longer will you be able to pick any doctor. Any hospital. Instead, HMO hands you a limited list and tells you to select a "primary-care physician". HMO demands

you see this doctor first for whatever medical problems might arise. (Some exceptions may apply in emergencies.) You should also know that through a series of financial incentives, HMO encourages this doctor to handle as many patients as possible without referring to a specialist. When an HMO doctor makes a specialist referral, it could take money directly out of his pocket. Make too many referrals, and he could find himself in trouble with HMO.

Many senior citizens regularly require the services of a cardiologist, internist, podiatrist, optometrist and other specialists. Having the freedom to choose these specialists is vital. You won't get it from HMO.

Travel at your own risk.

If travel is to play a major part in your retirement plans, you had better stay healthy. HMO Medicare plan will be the first to tell you that if you travel frequently, their program may not be for you.

Are HMO Medicare plans cheaper than Blue Cross and Blue Shield Medicare supplement plans? Yes. But don't make rash judgments based on price alone. The eventual cost may be far too high.

Peace of mind.

Blue Cross and Blue Shield have always been there when you've needed us. And we'll continue to be there. Assuring you of the highest quality medical coverage available. Whenever, wherever, and by whomever you so desire. It's why Blue Cross and Blue Shield is the standard by which other health care plans have been measured for almost 50 years.

When you've got Blue Cross and Blue Shield, you've got everything.

1333 Chestnut Street, Philadelphia, PA 19107

PLAINTIFF'S EXHIBIT 256

A VALUABLE LESSON IN PREVENTIVE HEALTH CARE COVERAGE

Personal Choice vs. HMO

Personal Choice℠ gives you *your choice* of any of our network hospitals.

Personal Choice℠ lets you choose any of our 7,600 doctors.

Personal Choice℠ covers routine doctor visits.

Personal Choice℠ gives you the freedom to *go directly* to a specialist.

Personal Choice℠ covers emergency and follow-up care. Anytime. Anywhere.

Personal Choice℠ includes a prescription plan.

Personal Choice℠ will co-pay treatment outside the hospital network.

Personal Choice℠ gives you
Peace of mind.
Freedom of choice.
Confidence.
Security.
Comfort.

And almost 50 years of trusted medical experience from Blue Cross of Greater Philadelphia and Pennsylvania Blue Shield. Personal Choice℠. The only choice. ***For more information ask your employer.***

HMO *assigns* you your hospital.

HMO *restricts* you to one primary care doctor.

HMO covers routine doctor visits.

HMO insists you get *permission* before you can see a specialist.

HMO hopes you never have an emergency. Because HMO emergency coverage is *limited* away from home.

HMO *charges extra* for their prescription plan.

HMO won't.

Abington Memorial Hospital • Brandywine Hospital • Delaware County Memorial Hospital • Fox Chase Cancer Center • Grand View Hospital • The Lower Bucks Hospital • Methodist Hospital • Montgomery Hospital • Pottstown Memorial Medical Center • Riddle Memorial Hospital • Rolling Hill Hospital • Sacred Heart Medical Center • St. Christopher's Hospital for Children • Temple University Hospital • Thomas Jefferson University Hospital • Wills Eye Hospital

PLAINTIFF'S EXHIBIT 257

5 benefits

Personal Choice℠ gives you

HMO doesn't.

1.

Choice of hospitals

Personal Choice℠ gives you the freedom to choose any of our network hospitals. HMO tells you which hospital to use.

2.

Choice of doctors and specialists

Personal Choice℠ lets you choose any of our 7,600 physicians. And you have the right to consult any of our specialists directly. HMO restricts you to one "primary care" doctor and insists you get permission to visit a specialist.

3.

Emergency and follow-up coverage anywhere

Personal Choice℠ covers emergency and follow-up care. Anytime. Anywhere. HMO emergency coverage is limited away from home.

4.

Prescription drugs

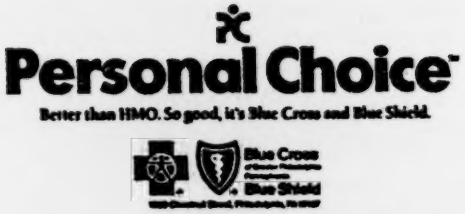
Personal Choice℠ includes a prescription plan. HMO charges extra for their prescription plan.

5.

Coverage outside of network hospitals

Personal Choice℠ will co-pay treatment outside the network. HMO won't.

For more information ask your employer.



Abington Memorial Hospital • Brandywine Hospital • Delaware County Memorial Hospital • Fox Chase Cancer Center • Grand View Hospital • The Lower Bucks Hospital • Methodist Hospital • Montgomery Hospital • Pottstown Memorial Medical Center • Riddle Memorial Hospital • Rolling Hill Hospital • Sacred Heart Medical Center • St. Christopher's Hospital for Children • Temple University Hospital • Thomas Jefferson University Hospital • Wills Eye Hospital

Philadelphia School District Employees

For the best in health care for you and your family: Call 1-800-443-1776.

And ask for Personal Choice℠

Personal Choice is Blue Cross and Blue Shield.

Personal Choice is **NO payroll deductions.**

Personal Choice is the right to see a specialist when you want to see one. Without asking permission.

Personal Choice is doctor's office visits.

Personal Choice is chiropractic coverage.

Personal Choice is your choice of over 8,600 medical professionals.

Personal Choice is emergency and follow-up care. Anytime. Anywhere.

Personal Choice is teaching hospitals. Community hospitals. Medical school hospitals. Specialty hospitals, like Fox Chase Cancer Center, Wills Eye Hospital and St. Christopher's Hospital for Children.

Personal Choice is now available in your school district. Come to our Open Enrollment presentation or call us 1-800-443-1776.

Make Personal Choice your choice.

Personal Choice®

So good, it's Blue Cross and Blue Shield.

Blue Cross Blue Shield

Abington Memorial Hospital • Brandywine Hospital • Delaware County Memorial Hospital • Fox Chase Cancer Center • Grand View Hospital • The Lower Bucks Hospital • Methodist Hospital • Montgomery Hospital • Pottstown Memorial Medical Center • Riddle Memorial Hospital • Rolling Hill Hospital • Sacred Heart Medical Center • St. Christopher's Hospital for Children • Temple University Hospital • Thomas Jefferson University Hospital • Wills Eye Hospital

PLAINTIFF'S EXHIBIT 258

I couldn't believe 81,856 people left HMO's.

WHY?

According to The Philadelphia Inquirer,* 81,856 people from the Greater Philadelphia area left their HMO plan from April 1985 through March 1986. That's many individual—not just a few corporate—decisions to leave HMO's.

Could it be because HMO restricts your choice of doctors? Hospitals? Limits your coverage away from home? Charges extra for prescription plans? And insists you get permission first before seeking the advice of a specialist?

With HMO, you are given a list of doctors to choose from. Once you've selected your primary care doctor, you must funnel all your health care needs through that particular physician. You're not allowed to go directly to any other doctor, dermatologist, ophthalmologist, radiologist, cardiologist—any specialist—without your physician's OK.

We think that's reason enough to leave HMO.
Don't you?

With new Personal Choice℠ from Blue Cross and Blue Shield, you get *complete access* to a growing list of more than 7,600 doctors at last count. Any time. All the time. No questions. No hassles. You don't have to funnel your medical needs through one assigned doctor. Complete access to our network hospitals. Specialty hospitals. Medical school hospitals. A children's hospital. Community hospitals. The freedom to go directly to a specialist without asking permission. Physical exams. Routine doctor visits. Pediatric care. Prescription drugs. Immunizations. Preventive dental care for children under 12. Emergency and follow-up care. Anytime. Anywhere. Coverage outside our network hospitals—without having to ask your doctor first.

Now, you can have preventive health care coverage along with all the freedom of choice and the security of Blue Cross and Blue Shield. Or be another HMO statistic. The choice is yours.

For more information, ask your employer.

* Philadelphia Inquirer June 2, 1986 7-D Source:PA Department of Health.

Abington Memorial Hospital • Brandywine Hospital • Delaware County Memorial Hospital • Fox Chase Cancer Center • Grand View Hospital • The Lower Bucks Hospital • Methodist Hospital • Montgomery Hospital • Pottstown Memorial Medical Center • Riddle Memorial Hospital • Rolling Hill Hospital • Sacred Heart Medical Center • St. Christopher's Hospital for Children • Temple University Hospital • Thomas Jefferson University Hospital • Wills Eye Hospital

It's my life.
I resent having to ask
my HMO doctor
for permission
to see a specialist.

With new Personal Choice℠,
there's no asking,
no waiting. And no worrying.

Personal Choice℠ from Blue Cross of Greater Philadelphia and Pennsylvania Blue Shield gives you the freedom to go directly to a specialist. No questions. No hassles. Get a second opinion. A third. Go. It's your health. It should be your choice.

It's not with HMO. HMO insists you get permission first. That means you're not allowed to go directly to a specialist. Such as a cardiologist or a urologist. Or any other doctor—without your physician's okay. Imagine asking permission to take care of your own health.

With Personal Choice℠, the decision is yours. You get *complete access* to our growing list of over 8,000 doctors and other medical professionals. Complete access to our quality network hospitals. Specialty hospitals. Medical school hospitals. A children's hospital.

You're covered for physical exams. Routine doctor visits. Pediatric care. Prescription drugs. Immunizations. Preventive dental care for children under 12. Emergency and follow-up care. Anytime. Anywhere. And if you choose to go outside our network hospitals, we'll co-pay the coverage.

Personal Choice℠. The best choice in preventive health care coverage. Because you shouldn't have to ask permission when it's your life.

For more information, ask your employer.

Personal Choice

Better than HMO. So good, it's Blue Cross and Blue Shield.

Blue Cross
Blue Shield

Abington Memorial Hospital • Brandywine Hospital • Delaware County Memorial Hospital • Fox Chase Cancer Center • Grand View Hospital • The Lower Bucks Hospital • Methodist Hospital • Montgomery Hospital • Pottstown Memorial Medical Center • Riddle Memorial Hospital • Rolling Hill Hospital • Sacred Heart Medical Center • St. Christopher's Hospital for Children • Temple University Hospital • Thomas Jefferson University Hospital • Wills Eye Hospital

PLAINTIFF'S EXHIBIT 1141

Your money or your life.

The high cost of HMO Medicare.

[Photo Omitted in Printing]

Nothing is free. There are always costs. Some up-front. Some not-so-up-front. You get what you pay for.

There's an HMO peddling a curious medical plan for senior citizens that would restrict your freedom to choose your own doctors and hospitals. Take away your right to see the specialist of your choice. And surrender your Medicare coverage as you now know it.

One more thing. This HMO requires you to give up the protection and security of your Blue Cross and Blue Shield Medicare supplement.

For what? A pioneer venture between a profit-oriented HMO and the Federal Government. You've been around long enough to know the sort of *unexpected* situations that could pop up from a combination like this.

They say, when you've got your health, you've got everything. It should also be mentioned that when you've got the right health coverage, you get to *keep* everything.

Don't make a rash judgment based on price alone. The eventual cost may be far too high.

We've always been there when you've needed us. And we will continue to be there. It just makes good sense to go with the freedom and peace of mind that Blue Cross of Greater Philadelphia and Pennsylvania Blue Shield provide.

When you've got Blue Cross and Blue Shield, you've got everything.

Blue Cross of Greater Philadelphia Pennsylvania Blue Shield

1333 Chestnut Street, Philadelphia, PA 19107

Which doctors? Which hospitals?
The truth about HMO.

No longer will you be able to pick any doctor. Any hospital. Instead, HMO hands you a limited list and tells you to select a "primary-care physician." HMO demands you see this doctor first for whatever medical problems might arise. (Some exceptions may apply in emergencies.) You should also know that through a series of financial incentives, HMO encourages this doctor to handle as manly patients as possible without referring to a specialist. When an HMO doctor does make a specialist referral, it could take money directly out of his pocket. Make too many referrals, and he could find himself in trouble with HMO.

Many senior citizens regularly require the services of a cardiologist, internist, podiatrist, optometrist and other specialists. Having the freedom to choose these specialists is vital. You won't get it from HMO.

And if one of your retirement dreams was to travel and see America, you had better stay healthy because this HMO plan has very limited coverage away from home. Limited freedom. Limited security. And, limited peace of mind. You go where you are told, and you see who you are told to see. No ifs, ands, or buts.

If you find this new brand of *take it or leave it* health care insurance a bit unsettling, you should. We know we do. Your continued good health is the single most important thing in your life. You've earned the right to choose for yourself the highest quality health care available.

And only one organization guarantees this choice—Blue Cross of Greater Philadelphia and Pennsylvania Blue Shield.

Safe and sound.
The facts about Blue Cross and
Blue Shield.

Blue Cross and Blue Shield is the most widely accepted medical coverage you can have. It's honored by more doctors, specialists and hospitals than any other plan in the world.

The Blue Cross and Blue Shield 65-Special and 65-Gold℠ Medicare supplement plans guarantee senior citizens the finest coverage available at an affordable monthly fee.

Blue Cross of Greater Philadelphia and Pennsylvania Blue Shield are working hard to keep quality health care within everyone's reach. We're a non-profit organization. We turn no one away. And that's why Blue Cross and Blue Shield coverage is the standard by which all other medical plans are measured.

PLAINTIFF'S EXHIBIT 782

PERSONAL CHOICE RADIO AD

Transcript of "81,856"

ACCORDING TO THE PHILADELPHIA INQUIRER, 81,856 PHILADELPHIA AREA RESIDENTS LEFT HMO'S THIS PAST YEAR. WHY? COULD IT BE THAT PEOPLE WEREN'T REALLY SURE WHAT HMO COVERAGE WAS ALL ABOUT UNTIL IT WAS TOO LATE? HMO WAS A NOVELTY? AND THE ONLY PREVENTIVE CARE GAME IN TOWN? WELL, THE NOVELTY HAS WORN OFF. AND THE GAME IS UP. BLUE CROSS AND BLUE SHIELD INTRODUCES PERSONAL CHOICE. UNLIKE HMO PLANS THAT LIMIT YOUR CHOICE OF HOSPITALS AND DOCTORS, PLUS INSIST YOU ASK PERMISSION TO SEE A SPECIALIST . . . NEW PERSONAL CHOICE GIVES YOU THE FREEDOM TO GO TO ANY OF OUR NETWORK HOSPITALS, SEE ANY OF OUR DOCTORS, AND WE WOULD NEVER INHIBIT YOUR RIGHT TO GO DIRECTLY TO A SPECIALIST. NOW YOU CAN HAVE PREVENTIVE HEALTH CARE COVERAGE ALONG WITH ALL THE SECURITY OF BLUE CROSS AND BLUE SHIELD. OR BE ANOTHER HMO STATISTIC. THE CHOICE IS YOURS.

FOR MORE INFORMATION, ASK YOUR EMPLOYER ABOUT PERSONAL CHOICE.

PLAINTIFF'S EXHIBIT 783

PERSONAL CHOICE RADIO AD

Transcript of "PROBLEM SOLVER"

PROBLEM: YOU WANT PREVENTIVE HEALTH CARE COVERAGE FOR YOU AND YOUR FAMILY, BUT YOU DON'T WANT AN HMO.

SOLUTION: NEW PERSONAL CHOICE FROM BLUE CROSS AND BLUE SHIELD. PREVENTIVE HEALTH CARE COVERAGE THAT GIVES YOU JUST THAT. PERSONAL CHOICE. UNLIKE HMO PLANS THAT RESTRICT YOUR CHOICE OF HOSPITALS, DOCTORS, AND FORCE YOU TO GET PERMISSION BEFORE YOU CAN SEE A SPECIALIST. NEW PERSONAL CHOICE GIVES YOU THE FREEDOM TO GO TO ANY OF OUR NETWORK HOSPITALS, SEE ANY OF OUR 6,500 DOCTORS. AND WE WOULD NEVER INHIBIT YOUR RIGHT TO CONSULT A SPECIALIST. PERSONAL CHOICE COVERS ROUTINE OFFICE VISITS, PHYSICALS, PRESCRIPTIONS, PEDIATRIC CARE . . . EVEN PREVENTIVE DENTAL CARE FOR CHILDREN UNDER 12. SO IF YOU WANT PREVENTIVE HEALTH CARE COVERAGE FOR YOU AND YOUR FAMILY, BUT YOU DON'T WANT THE RESTRICTIONS OF AN HMO, NO PROBLEM. PERSONAL CHOICE. BETTER THAN HMO. SO GOOD, IT'S BLUE CROSS AND BLUE SHIELD.

PLAINTIFF'S EXHIBIT 784

PERSONAL CHOICE RADIO AD

Transcript of "SOMETHING NEW"

YOU'RE GOING TO HEAR SOMETHING FROM BLUE CROSS AND BLUE SHIELD YOU NEVER THOUGHT YOU'D HEAR. IT HAS NOTHING TO DO WITH TRADITIONAL MEDICAL COVERAGE. IT'S SOMETHING COMPLETELY NEW AND DIFFERENT. THE ONLY THING THAT'S THE SAME IS THE SECURITY AND TRUST OF THE BLUE CROSS AND BLUE SHIELD NAME. PRESENTING PERSONAL CHOICE. PREVENTIVE HEALTH CARE COVERAGE THAT GIVES YOU JUST THAT. PERSONAL CHOICE. UNLIKE HMO PLANS THAT RESTRICT YOUR CHOICE OF HOSPITALS, DOCTORS, AND INSIST YOU GET PERMISSION BEFORE YOU CAN SEE A SPECIALIST . . . NEW PERSONAL CHOICE GIVES YOU THE FREEDOM TO GO TO ANY OF OUR NETWORK HOSPITALS, SEE ANY OF OUR 6,500 DOCTORS. AND WITH PERSONAL CHOICE, YOU'RE FREE TO GO DIRECTLY TO A SPECIALIST. PERSONAL CHOICE COVERS ROUTINE OFFICE VISITS, PRESCRIPTIONS, PEDIATRIC CARE . . . EVEN PREVENTIVE DENTAL CARE FOR CHILDREN UNDER 12. EVERYTHING YOU'VE EVER WANTED IN PREVENTIVE HEALTH CARE COVERAGE AND MORE. PERSONAL CHOICE. BETTER THAN HMO. SO GOOD, IT'S BLUE CROSS AND BLUE SHIELD.

PLAINTIFF'S EXHIBIT 785

PERSONAL CHOICE TV AD
TRANSCRIPT OF "CABBIE"

CABBIE:

I DON'T LIKE THOSE HMO HEALTH PLANS.
I'M GOING WITH A NEW IDEA.
PERSONAL CHOICE.

VOICE OVER:

BETTER THAN HMO.
SO GOOD, IT'S BLUE CROSS AND BLUE SHIELD.

SUPER:

BLUE CROSS OF GREATER PHILADELPHIA
PENNSYLVANIA BLUE SHIELD

PLAINTIFF'S EXHIBIT 786

PERSONAL CHOICE TV AD
TRANSCRIPT OF "FATHER/BABY"

FATHER:

YEAH DADDY HAS THE BEST PROTECTION FOR HIS LITTLE GUY. IT'S BRAND NEW. JUST LIKE YOU.

VOICE OVER:

PERSONAL CHOICE. BETTER THAN HMO.
SO GOOD, IT'S BLUE CROSS AND BLUE SHIELD.

SUPER:

BLUE CROSS OF GREATER PHILADELPHIA
PENNSYLVANIA BLUE SHIELD

PLAINTIFF'S EXHIBIT 787

PERSONAL CHOICE TV AD
TRANSCRIPT OF "SHOPPER"

SHOPPER:

I WOULDN'T TRUST MY FAMILY'S HEALTH CARE TO ANYONE BUT BLUE CROSS AND BLUE SHIELD. WITH NEW PERSONAL CHOICE, I DON'T HAVE TO.

VOICE OVER:

BETTER THAN HMO.
SO GOOD, IT'S BLUE CROSS AND BLUE SHIELD.

SUPER:

BLUE CROSS OF GREATER PHILADELPHIA
PENNSYLVANIA BLUE SHIELD

PLAINTIFF'S EXHIBIT 788

PERSONAL CHOICE TV AD
TRANSCRIPT OF "RESENTFUL MAN"

MAN:

IT'S MY LIFE. I RESENT HAVING TO ASK MY MY HMO DOCTOR FOR PERMISSION TO SEE A SPECIALIST.

SPOKESPERSON:

WITH NEW PERSONAL CHOICE FROM BLUE CROSS AND BLUE SHIELD. THERE'S NO ASKING. NO WORRYING. YOU GET ROUTINE DOCTOR VISITS, PRESCRIPTIONS, PEDIATRICS. IT'S PREVENTIVE HEALTH CARE COVERAGE WITH MORE FREEDOM OF CHOICE THAN EVER BEFORE. PERSONAL CHOICE. BECAUSE YOU SHOULDN'T HAVE TO ASK PERMISSION. WHEN IT'S YOUR LIFE.

VOICE OVER:

PERSONAL CHOICE. BETTER THAN HMO.
SO GOOD, IT'S BLUE CROSS AND BLUE SHIELD.

SUPER:

BLUE CROSS OF GREATER PHILADELPHIA
PENNSYLVANIA BLUE SHIELD

PLAINTIFF'S EXHIBIT 789

PERSONAL CHOICE TV AD
TRANSCRIPT OF "DISTRAUGHT WOMAN"

WOMAN:

THE HOSPITAL MY HMO SENT ME TO JUST WASN'T ENOUGH. IT'S MY FAULT.

SPOKESPERSON:

WITH NEW PERSONAL CHOICE FROM BLUE CROSS AND BLUE SHIELD. YOU CAN GO TO ANY OF OUR NETWORK HOSPITALS, SEE ANY OF OUR DOCTORS. IT'S PREVENTIVE HEALTH CARE COVERAGE WITH MORE FREEDOM OF CHOICE THAN EVER BEFORE. YOU GET ROUTINE DOCTOR VISITS, PRESCRIPTIONS, PEDIATRICS. PERSONAL CHOICE. IT'S JUST EASIER TO LIVE WITH.

VOICE OVER:

PERSONAL CHOICE. BETTER THAN HMO.
SO GOOD, IT'S BLUE CROSS AND BLUE SHIELD.

SUPER:

BLUE CROSS OF GREATER PHILADELPHIA
PENNSYLVANIA BLUE SHIELD

PLAINTIFF'S EXHIBIT 790

PERSONAL CHOICE TV AD
TRANSCRIPT OF "TENNIS/BABY"

WOMAN:

NEW PERSONAL CHOICE IS COMPLETELY DIFFERENT FROM ANYTHING BLUE CROSS AND BLUE SHIELD HAS EVER DONE BEFORE. YOU GET ROUTINE DOCTOR VISITS, PRESCRIPTIONS, EVEN PEDIATRIC CARE. I JUST FEEL GOOD ABOUT IT.

FATHER:

OH DON'T WORRY. DADDY HAS THE BEST PROTECTION FOR HIS LITTLE GUY. PERSONAL CHOICE FROM BLUE CROSS AND BLUE SHIELD. IT'S BRAND NEW. JUST LIKE YOU.

VOICE OVER:

PERSONAL CHOICE. BETTER THAN HMO. SO GOOD. IT'S BLUE CROSS AND BLUE SHIELD.

SUPER:

BLUE CROSS OF GREATER PHILADELPHIA
PENNSYLVANIA BLUE SHIELD

FOR MORE INFORMATION ASK YOUR EMPLOYER.

PLAINTIFF'S EXHIBIT 791

PERSONAL CHOICE TV AD
TRANSCRIPT OF CABBIE/ SHOPPER

CABBIE:

I DON'T LIKE THOSE HMO HEALTH PLANS. YOU GET ONE DOCTOR NO CHOICE OF HOSPITALS. FORGET IT. I'M GOING WITH THAT NEW IDEA FROM BLUE CROSS BLUE SHIELD, PERSONAL CHOICE. EVERYTHING HMO EVER PROMISED. AND MORE.

SHOPPER:

WE GET ROUTINE DOCTOR VISITS, PRESCRIPTIONS EVEN PEDIATRICS. I WOULDN'T TRUST MY FAMILY'S HEALTH CARE TO ANYONE BUT BLUE CROSS AND BLUE SHIELD. WITH NEW PERSONAL CHOICE, I DON'T HAVE TO.

VOICE OVER:

PERSONAL CHOICE. BETTER THAN HMO.
SO GOOD, IT'S BLUE CROSS AND BLUE SHIELD.

SUPER:

BLUE CROSS OF GREATER PHILADELPHIA
PENNSYLVANIA BLUE SHIELD

FOR MORE INFORMATION ASK YOUR EMPLOYER.

PLAINTIFF'S EXHIBIT 344

HMO·PA/NJ vs.
Blue Cross Blue Shield Personal Choice℠ program.

It's your choice.

	HMO PA/NJ	Blue Cross Blue Shield Personal Choice ℠ program
Participating Doctors	7,830	6,500
Participating hospitals in Delaware Valley	83	16
Membership as of July 1st 1986	600,000	0*
Can you chose your own Doctor?	YES	YES
Can you change Doctors?	Absolutely	YES
Is the number of patients per hour in Doctor's office monitored?	YES	NO
Is there a comprehensive program to certify quality of Doctor applicants?	YES	NO
Does family Doctor coordinate patient's care?	YES	NO
Years of experience in operating a federally approved managed health care system	15	0
National Medical Excellence Program ℠ by specialists at world-renowned hospitals at no extra charge	YES	NO
Free US HEALTHCHECK ℠ early detection cancer programs	YES	NO

	HMO PA/NJ	Blue Cross Blue Shield Personal Choice SM Program
Free Healthy Outlook SM weight control, smoking, and reimbursed exercise programs	YES	NO
Available to groups as small as 25 employees	YES	NO

Maybe these are some of the reasons over 600,000 people have chosen HMO·PA/NJ over other health care plans.

HMO
PENNSYLVANIA
NEW JERSEY
US HEALTHCARE

We want you to have the best medical care available.

PLAINTIFF'S EXHIBIT 345

Friday, Aug. 29, 1986 The Philadelphia Inquirer

"We went out of our way to keep Heather O'Brien's arms the same length."

Jeff Weiner, M.D.

[Photo Omitted in Printing]

"Why would we send a patient to Baltimore when some of the best surgeons are right here on our team?

In Heather O'Brien's case she needed a unique wrist operation to keep her arms the same length.

Our National Medical Excellence Program℠ found a surgeon in Baltimore we felt was the best in the country.

It's what I would've done if she were my own child."

HMO
PENNSYLVANIA
NEW JERSEY
US HEALTHCARE

Why are so many people picking us and staying with us? Because we're putting the family doctor back into your life.

PLAINTIFF'S EXHIBIT 346

[Photo Omitted in Printing]

"A headache that won't go away could be your boss, a migraine or a more serious medical problem.

If you come to me, your family doctor, we'll find out what the problem is. Together we can decide what kind of specialist you should see, if you really need one.

Then I want you to come back and see me. Because I care."

HMO
PENNSYLVANIA
NEW JERSEY
US HEALTHCARE

Why are so many people picking us and staying with us? Because we're putting the family doctor back into your life.

PLAINTIFF'S EXHIBIT 348

WHEN IT COMES TO BEING ADMITTED TO A HOSPITAL, THERE'S SOMETHING PERSONAL CHOICE℠ MAY NOT BE WILLING TO ADMIT.

According to Personal Choice℠, their members have "complete access to any of [their] network hospitals."

And "complete access to a growing list of more than 8,000 participating doctors."

But then you look at Personal Choice's very own Hospital and Physician Directory. According to it, there are 16 hospitals in their network. And there is a long list of doctors with admitting privileges to those hospitals.

But wait. What's this? Over fifty gray pages listing doctors who don't have admitting privileges to those hospitals. Thousands of them. Thousands!

And should you choose to go outside that hospital network, it's this gray area you have to worry about. Because it can end up costing you a lot of green. Up to nearly a thousand dollars. A thousand!

So much for personal choice.

Now. If you want a health plan that puts the family doctor back into your life, and sees to it that you get the best medical care available with no gray areas, it's HMO·PA/NJ-U.S. HEALTHCARE.

[Photo Omitted in Printing]

What they leave out of their advertising could come out of your wallet.

HMO PENNSYLVANIA NEW JERSEY
US HEALTHCARE

PLAINTIFF'S EXHIBIT 349

IF YOU REALLY LOOK INTO "PERSONAL CHOICE℠," YOU MIGHT HAVE A BETTER NAME FOR IT.

Personal Choice℠ would be a perfectly good name, if they only lived up to it.

But when you consider that they give you only 16 hospitals in the Delaware Valley area to choose from, doesn't that sound like "Limited Choice"?

Take the list of doctors in their own directory. Half of them don't have admitting privileges to any of those 16 hospitals. To us that sounds a lot more like "Severely Limited Choice."

And, should you personally choose one of those doctors and go to a hospital outside of the network, it could cost you anywhere up to almost $1,000.00. Don't you think "Very Expensive Choice" is more like it?

Our health plan, on the other hand, gives you a choice of 84 hospitals instead of 16. Plus over 8,000 doctors.

So, if you *really* want an excellent name for a health plan, how about this one: HMO·PA/NJ.

A U.S. Healthcare Company.

HMO PENNSYLVANIA NEW JERSEY
US HEALTHCARE

☐ Limited Choice

☐ Severely Limited Choice

☐ Very Expensive Choice

PLAINTIFF'S EXHIBIT 1196

Television Ad—"O'BRIEN"

Announcer: Dr. Jeff Weiner

Dr. Weiner: Why would we send a patient to Baltimore when some of the best surgeons are right here on our team? In Heather O'Brien's case she needed a unique wrist operation to allow her arms to grow to the same length. Our National Medical Excellence Program found a surgeon in Baltimore who we felt was the best in the country. It's what I would have done if she were my own. You serve, Heather!

Announcer: HMO PA/New Jersey has over 8,000 doctors like Jeff Weiner. We're putting the family doctor back into your life.

PLAINTIFF'S EXHIBIT 1197

Television Ad—"SPECIALIST"

Announcer: Dr. Sandy Harmon

Dr. Harmon: You've had a headache for two weeks. Do you need an eye doctor? a neurologist? a psychiatrist? A headache that won't go away could be . . . your boss (chuckle) . . . could be a migraine . . . or a more serious medical problem. We can decide together whether you need to see a specialist and which one. And then, I want you to be sure to come back to see me because I really care about you.

Announcer: HMO-PA/New Jersey has over 8,000 doctors like Sandy Harmon. We're putting the family doctor back into your life.

PLAINTIFF'S EXHIBIT 1198

Television Ad—"FLIPPING"

ANNCR: This is the Hospitals and Physicians Directory of the Personal Choice health care plan.

Impressive. They've got 16 hospitals in their network.

And here's a long list of doctors with admitting privileges to those hospitals.

Uh, oh. Here's a gray area:

A long list of doctors who don't have admitting privileges to any of those hospitals.

Better watch out for the gray area.

Going outside that hospital network could cost you a lot of green.

Look into a healthy health care plan. HMO Pennsylvania/ New Jersey.

PLAINTIFF'S EXHIBIT 1199

Television Ad—"CRITICAL CONDITION"

A certain health care plan proudly advertises "complete access" to any of its 16 network hospitals.

But do you know that many of their doctors don't have admitting privileges to any of those hospitals?

Do you know that if you go to a hospital outside their network, it could cost you almost a thousand dollars?

A health care plan with such a critical flaw is not in the best of shape

(MUSIC)

(MUSIC)

Look into a healthy health care plan. HMO Pennsylvania/ New Jersey.

PLAINTIFF'S EXHIBIT P-1201(b)

Transcript of "O'Brien" Radio Ad

DR. WEINER: We want our patients to have the best medical care available. No ifs. No buts. No maybes.

VO: Dr. Jeff Weiner, Medical Director HMO PA/New Jersey.

DR. WEINER: Take Heather O'Brien, for example. A fourteen year old girl whose arm was not growing properly. We could have sent her to a number of very competent surgeons here in Pennsylvania or New Jersey. But, our National Medical Excellence Program found a doctor in Baltimore, who we felt was the best in the country for Heather's problem. HMO PA/New Jersey sent Heather and her mother to Baltimore and picked up the whole tab. If there had been someone better in Texas or California, we would have sent her there. Heather needed the best. It's what I would have done if she were my own.

VO: HMO PA/New Jersey. A U.S. Healthcare Company. Why are so many people picking us and staying with us? Because we're putting the family doctor back into your life.

PLAINTIFF'S EXHIBIT P-1202(b)

Transcript of "Sandy Harmon" (Specialist) Radio Ad

SANDY HARMON: I think it's dreadful to have a health care plan that encourages patients to wander around from specialist to specialist to find out what's wrong with them.

VO: Dr. Sandy Harmon, HMO PA/New Jersey.

SANDY HARMON: Now, suppose you've had a headache for a couple weeks. Do you see an eye doctor? A neurologist? A psychiatrist? A headache that won't go away could be your boss, a migraine or a more serious medical problem. When you come to see me, your family doctor, together we could decide which specialist you should see if you need one.

I'm all for freedom of choice. But why waste time and possibly delay appropriate treatment. Doesn't it make more sense to start with someone who can help you to figure out what the problem is, and then, can make sure that you get the best medical care available?

VO: HMO Pa/New Jersey. A U.S. Healthcare Company. Why are so many people picking us and staying with us? Because we're putting the family doctor back into your life.

APPENDIX G

THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1869

In The

Supreme Court of the United States

October Term, 1989

INDEPENDENCE BLUE CROSS, PENNSYLVANIA BLUE SHIELD, and DAVID S. MARKSON,

Petitioners,

v.

U.S. HEALTHCARE, INC., UNITED STATES HEALTH CARE SYSTEMS OF PENNSYLVANIA, INC., and HEALTH MAINTENANCE ORGANIZATION OF NEW JERSEY, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*David F. Simon
David I. Bookspan
Gary L. Leshko
Wolf, Block, Schorr and Solis-Cohen
Twelfth Floor Packard Building
15th and Chestnut Streets
Philadelphia, Pennsylvania 19102
(215) 977-2000

Attorneys for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTERSTATEMENT OF THE CASE

This action stems from comparative advertising promoting the competing health care insurance and health maintenance organization products offered respectively by petitioners and respondents. Respondents claimed that petitioners' advertising was false and misleading, and alleged a claim of federal unfair competition under the Lanham Act, 15 U.S.C. § 1125(a), and common law claims of defamation, disparagement, and interference with contractual relations. Relying on settled precedent, the Court of Appeals for the Third Circuit held that the advertisements were commercial speech, and that such speech is not entitled to the heightened standard of First Amendment protection accorded to noncommercial speech.

In so holding, the court of appeals did not, contrary to petitioners' groundless arguments, conclude that existing First Amendment doctrine is "unsuited to this kind of case," nor did it engage in a "novel analysis" of the issue, nor did it "depart[ ] from this Court's approach in First Amendment cases." Petition for Writ of Certiorari ("Pet.") at 2. Rather, the court merely applied this Court's clear precedent, under which accurate, nondeceptive commercial speech is entitled to limited constitutional protection, and false, deceptive or misleading commercial speech merits *no* protection. The inevitable result of this analysis was the court's holding that defamation, disparagement, federal unfair competition and interference with contractual relations claims based upon false product advertisements are not subject to the heightened

"actual malice" requirement applicable to claims stemming from noncommercial speech. Accordingly, the instant petition is without merit and should be denied.

A. Factual Background

Starting in the early 1970s, respondents began to offer federally qualified health maintenance organizations ("HMOs") as an alternative to petitioners' traditional indemnity health insurance. By 1986, U.S. Healthcare's HMOs could claim approximately 600,000 members. App. 4a. This rapid growth came primarily at the expense of petitioners' traditional insurance. App. 4a-5a.

Faced with this large loss of enrollment, in late 1985 petitioners started to develop a "preferred provider organization" ("PPO") type of health insurance in an admitted attempt to compete with respondents' HMOs. App. 5a. In July 1986, after much thought and deliberation, petitioners launched their new PPO, "Personal Choice," through a "deliberately 'aggressive and provocative' comparative advertising campaign." App. 5a. The most egregious of these advertisements went so far as to imply that HMO membership could cause the loss of life or health. App. 6a-7a.

The admitted purpose of petitioners' advertisements was to win back HMO members for Personal Choice. App. 5a. Respondents promptly brought the instant action alleging that these advertisements were false, deceptive and misleading. Respondents also instituted their own corrective advertising campaign in an attempt

to rebut the false information and innuendo disseminated through petitioners' advertising.

B. The Decision Of The Court Of Appeals

Following a trial, at the conclusion of which the jury was deadlocked 7-1 in favor of respondents, the trial court dismissed respondents' claims. On appeal, the court of appeals reversed.

The court of appeals noted that, under a "traditional analysis," an examination of applicable First Amendment interests would require a determination of whether the speech was of public concern and whether the plaintiff was a public figure. App. 33a. However, based upon this Court's unbroken line of cases holding that commercial speech is entitled to less protection than noncommercial speech, the court determined that the correct starting point for its analysis was a determination of whether the advertisements were commercial speech. App. 33a-34a (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773-74 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

The court of appeals recognized that this Court's commercial speech cases all involved governmental regulation, rather than claims by private plaintiffs. Thus, the court believed that the issue before it, to wit, the applicability of the commercial speech doctrine to a case for damages brought by a private litigant, was a matter of first impression. App. 27a. Since this Court's holdings in commercial speech cases were not expressly confined to

the area of governmental regulation, nor could they be so confined in any principled fashion, the court found them fully applicable to the instant case. App. 34a-36a. Accordingly, the court held that the actual malice standard did not apply to civil actions based upon false or misleading commercial speech. App. 45a.

In essence, the court of appeals held that since even truthful commercial speech is entitled to less protection than noncommercial speech, and false and misleading commercial speech merits *no* First Amendment protection, commercial speech is not entitled to heightened constitutional protection in the context of a civil damages claim.

In order to determine whether the advertisements were commercial speech, the court of appeals analyzed the advertisements under the three-part test for commercial speech enunciated in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983). App. 37a. The court concluded that all three of the *Bolger* elements were present in the advertisements at issue, App. 39a-40a, and further noted that the advertisements had all of the characteristics that make commercial speech durable and not susceptible to "chill." App. 40a.

The court of appeals specifically rejected petitioners' attempts to "blur further the lines the [Supreme] Court has sought to draw in commercial speech cases" by seeking to immunize their otherwise actionable advertisements by including references to an issue of "public concern." App. 42a-43a (quoting *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447

U.S. 557, 563 n.5 (1980)). The court noted that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." App. 44a (quoting *Bolger*, 463 U.S. at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5)).

Petitioners' argument that their advertisements do not simply "link" their products to a public debate, but that their products *are* the focus of a public debate, was also rejected by the court of appeals because there was "no principled distinction between the products in *Central Hudson* and those at issue here." App. 45a. The court held that the "heightened protection of the actual malice standard" was not necessary to provide the "breathing space" required by the First Amendment in noncommercial speech cases. *Id.* (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)).

The court of appeals also considered the traditional public figure analysis utilized in noncommercial speech cases. The court concluded that such an analysis was inapplicable here because an advertiser could always insulate itself behind the actual malice standard merely by including references to public issues in its advertisements. App. 49a. The court also held that, in any event, the parties were not public figures for the purpose of "commenting on health care" because they acted "primarily to generate revenue by influencing customers," not to resolve any issues of public concern. App. 49a.

Accordingly, the court of appeals concluded that the advertisements at issue, as commercial speech, were not entitled to heightened First Amendment protection,

including the actual malice requirement imposed by *Gertz* for cases involving noncommercial speech and public figures.

REASONS FOR DENYING THE PETITION

This case exhibits none of the criteria typically viewed with favor by this Court in determining whether to grant certiorari. Petitioners do not argue that the case presents any conflict between the courts of appeals or between a state court of last resort and a court of appeals. Rather, they argue that the court below improperly failed to accept their unprecedented argument that the actual malice requirement should be extended to commercial speech. This argument is unavailing because the court of appeals, in a reasoned and annotated opinion, carefully followed this Court's commercial speech jurisprudence and applied that established doctrine to the facts of this case. The court in no way "diminished" the limited constitutional protection for commercial product advertisements which relate to matters of public concern, since it applied this Court's precedent holding that product advertising which links a product to a matter of public concern nevertheless remains commercial speech.

A. The Court Of Appeals Properly Applied This Court's Commercial Speech Doctrine In Finding That The Advertisements Were Commercial Speech And Therefore Not Entitled To Enhanced First Amendment Protection

Petitioners incorrectly argue that the court of appeals created a new commercial product advertising "exception" to the public figure doctrine by not finding that the

advertisers here were public figures and not requiring proof of actual malice. This argument fails because it disregards the core commercial speech doctrine established by this Court and followed by the court of appeals in reaching its decision.

This Court has "long recognized that not all speech is of equal First Amendment importance." *Dun & Bradstreet*, 472 U.S. at 758. It is clear beyond peradventure that the First Amendment accords less protection to commercial speech than to other constitutionally protected forms of expression. *Zauderer*, 471 U.S. at 637; *Bolger*, 463 U.S. at 64-65. Indeed, commercial speech occupies a "subordinate position in the scale of First Amendment values." *Board of Trustees of the State University of New York v. Fox*, 109 S. Ct. 3028, 3033 (1989) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

The fundamental reasons underlying this limited protection for commercial speech are fully applicable to the instant case. First, the economic motivation underlying commercial speech makes it unlikely that it will be chilled as noncommercial speech might be if afforded a lesser degree of protection. *Ohralik*, 436 U.S. at 462 n.20; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976). Moreover, commercial speech is more calculated in its origin than noncommercial speech, resulting in a greater opportunity to verify the accuracy of the speech without jeopardizing the free dissemination of ideas. *Dun & Bradstreet*, 472 U.S. at 758 n.5; *Central Hudson*, 447 U.S. at 564 n.6. Finally, if commercial speech were to be elevated to the same constitutionally exalted status as political or other

noncommercial speech, the force of the First Amendment's protection for noncommercial speech could be diluted by a simple leveling process. *See* App. 39a (citing *Ohralik*, 436 U.S. at 456); *see also Fox*, 109 S. Ct. at 3035; *Central Hudson*, 447 U.S. at 563-64 n.5.

Thus, only accurate, non-deceptive commercial speech is entitled to limited First Amendment protection. *Fox*, 109 S. Ct. at 3032; *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 340 (1986); *Central Hudson*, 447 U.S. at 562-63. False, deceptive or misleading commercial speech merits no First Amendment protection. *Zauderer*, 471 U.S. at 638; *Central Hudson*, 447 U.S. at 563; *Virginia State Board of Pharmacy*, 425 U.S. at 771-72.

Petitioners offer no reason why these basic principles should apply in the regulatory context but not in an action for damages under applicable state common law and the Lanham Act. Indeed, the policy reasons underpinning the doctrine fully apply in both contexts. The rules applied to commercial speech are distinct from those applied to noncommercial speech because the purpose of the limited protection accorded to accurate commercial speech, to wit, to facilitate informed and reliable decision-making, is not served by protecting false or misleading information. As this Court explained in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977):

> [T]he public and private benefits from commercial speech are derived from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.

433 U.S. at 383.

In light of the foregoing principles, the court of appeals was required to analyze, as a threshold matter, whether the advertisements were commercial speech, since the result of that analysis determines the degree of First Amendment protection. "At the outset, we must determine whether the expression is protected by the First Amendment." *Fox*, 109 S. Ct. at 3032 (quoting *Central Hudson*, 447 U.S. at 566).

Speech that proposes a commercial transaction or encourages the buying or selling of goods or services, such as advertising, constitutes commercial speech. *Zauderer*, 471 U.S. at 637; *Ohralik*, 436 U.S. at 455-56; *Central Hudson*, 447 U.S. at 561-62. As the court of appeals properly held, and petitioners apparently no longer contest, the product advertisements here clearly meet this Court's test for commercial speech.

Thus, the court of appeals was correct in determining, as a threshold matter, that the product advertisements at issue constituted commercial speech. Since even truthful commercial speech is entitled to only limited First Amendment protection, and false, deceptive or misleading commercial speech merits no First Amendment protection, petitioners' argument that their advertisements should be entitled to the enhanced constitutional protection afforded noncommercial speech is clearly without merit.[1]

---

[1] Petitioners argue that "the precise scope of the court of appeals' [holding] is open to some confusion" because, while the court held that the public figure test was inapplicable because of its finding that the advertisements were commercial

(Continued on following page)

B. Commercial Speech In Advertisements Is Not Immunized By Linking A Product To A Current Public Debate

Petitioners also argue that the commercial speech doctrine should be diluted by a requirement that commercial advertisements be subjected to an additional inquiry to determine whether they address "matters of public concern." This contention flies in the face of all established precedent. As this Court has expressly held:

> Advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech.

Bolger, 463 U.S. at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5).

In *Central Hudson*, the Court specifically stated that many products could be tied in some way to public concerns such as health and rejected the suggestion that an advertiser should be permitted to avoid the proscriptions against false and misleading advertising by linking

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(Continued from previous page)

speech, it indicated, according to petitioners, that "a modified public figure test might be applied in future cases" through its statement that "a corporation must do more than the claimants have done here to become a limited purpose public figure under *Gertz*." Pet. at 13 n.12. However, the resolution of a possible future hypothetical situation, stemming from mere *dictum* and irrelevant to the result here, is not a sound basis for granting the petition for a writ of certiorari. Moreover, it is clear that the court of appeals merely meant that a corporation must do more than simply advertise to become a public figure – i.e., a corporation might become a limited purpose public figure when it makes direct comments on public issues. *See* App. 48a-49a.

its product to a current public debate. *Central Hudson*, 447 U.S. at 563 n.5; *see also Fox*, 109 S. Ct. at 3032.[2] Indeed, this Court has expressly rejected the argument that commercial speech encouraging the buying or selling of goods can be so "inextricably interwined" with "pure speech" that the entirety must be classified as noncommercial. *Fox*, 109 S. Ct. at 3031.

Petitioners also restate their argument, expressly rejected by the court of appeals, that their commercial advertisements are entitled to protection under *Bigelow v. Virginia*, 421 U.S. 809 (1975). This argument fails because this Court has expressly limited *Bigelow* to advertisements involving constitutionally protected activities such as abortion. *Posadas*, 478 U.S. at 345-46. Since the marketing of health insurance is clearly not a "right" protected by the Constitution, *Bigelow* provides no support for petitioners' unprecedented attempt to expand the protection accorded commercial speech.

Recognizing the difficulties posed by this Court's precedent, petitioners also try to distinguish their case factually by arguing that their advertisements do more than "link" their product to a public debate. Rather, according to petitioners, their health insurance products are themselves matters of public concern. This approach,

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[2] An additional reason underlying the principle that product advertisements are not shielded from scrutiny simply because they mention public issues is the extreme difficulty inherent in drawing lines between purportedly "important" commercial advertising and other advertising. *See Virginia State Board of Pharmacy*, 425 U.S. at 765.

if adopted, would create an exception which would swallow the commercial speech doctrine. Numerous products can be considered "themselves" matters of public concern. For example, tobacco, alcohol, drugs and automobile safety are "themselves" matters of public concern, as is every product which claims to be "environmentally safe."

As this Court stated in *Central Hudson*, petitioners "enjoy the full panoply of First Amendment protections for their direct comments on public issues." 447 U.S. at 562 n.5.[3] To require a parity of protection for both commercial and pure speech could invite dilution of the First Amendment's guarantee with respect to the latter. *Fox*, 109 S. Ct. at 3035; *Ohralik*, 436 U.S. at 456.

C. Expansion Of The Protection Accorded Commercial Speech Would Harm The Public Interest

Petitioners fail to address the problems which would be created if their arguments were accepted. Requiring actual malice as an element of a claim for, *inter alia*, federal unfair competition under the Lanham Act would literally gut the efficacy of the recently expanded

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[3] Petitioners' argument that "a paid advertisement or other commercial statement often may constitute the only viable means through which a company can comment directly *about its products or services*" (Pet. 21) (emphasis added) simply misses the point. Petitioners clearly are able to comment directly about health care issues *without* simultaneously promoting their products, if they choose to do so. *See Fox*, 109 S. Ct. at 3031.

remedies against false advertising available under that Act. *See* App. 13a-14a. Proof of actual malice, in the form of knowing falsity or reckless disregard for truth, is a difficult obstacle to surmount, and the public would be ill-served if every plaintiff in a false advertising case – whether a public agency or private litigant – was required to meet this high standard.

Proof of actual malice is generally only in the hands of the false advertiser. It is at best difficult, expensive and time consuming, and at worst impossible, to extricate such proof from the defendant. Thus, the almost inevitable result of petitioners' proffered exception to the commercial speech doctrine for product advertisements involving a public issue would be to immunize such advertisements, which are already "hardy" and "chill-resistant," from scrutiny. This would in turn remove the teeth from the Lanham Act and inure to the profound detriment of the public interest.[4]

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[4] It is settled law that the Lanham Act's civil remedies for false advertising do not require proof of intent. *See, e.g., Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222 (3d Cir. 1990); *Procter & Gamble Co. v. Chesebrough-Pond's, Inc.*, 747 F.2d 114, 118-19 (2d Cir. 1984). Acceptance of petitioners' position here would upset this body of established precedent.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

*David F. Simon
David I. Bookspan
Gary L. Leshko
Wolf, Block, Schorr and
Solis-Cohen
Twelfth Floor Packard Building
15th and Chestnut Streets
Philadelphia, Pennsylvania 19102
(215) 977-2000

Attorneys for Respondents

*Counsel of Record

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CLERK

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No. 89-1869

In the Supreme Court of the United States

OCTOBER TERM, 1990

INDEPENDENCE BLUE CROSS, PENNSYLVANIA BLUE SHIELD, and DAVID S. MARKSON,
Petitioners

v.

U.S. HEALTHCARE, INC., UNITED STATES HEALTH CARE SYSTEMS OF PENNSYLVANIA, INC., and HEALTH MAINTENANCE ORGANIZATION OF NEW JERSEY, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

JAMES A. YOUNG *
STRADLEY, RONON, STEVENS & YOUNG
2600 One Commerce Square
Philadelphia, PA 19103
(215) 564-8000
Attorney for Petitioner Pennsylvania Blue Shield

JAY H. CALVERT, JR.
J. GORDON COONEY, JR.
ANDREW D. LEIPOLD
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000

PETER BUSCEMI *
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Attorneys for Petitioners Independence Blue Cross and David S. Markson

* Counsel of Record

July 5, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONERS

The court of appeals in this case acknowledged that it faced a difficult question of first impression. It also recognized that the case involved two distinct lines of First Amendment case law, one involving defamation and the public figure doctrine, the other involving commercial speech. Pet. App. 26a. Rather than reconciling the two lines of authority, the court below rejected the traditional defamation analysis entirely, and created a *per se* exception to the public figure doctrine for commercial advertising.

Curiously, respondents' brief fails even to acknowledge the competing precedent; it makes virtually no mention

of the public figure doctrine, or the cases from this Court that have applied the doctrine. Respondents apparently believe that the label "commercial speech" is sufficient to resolve the matter, even though none of the cases they cite involve a claim for defamation. Respondents also simply deny that the court of appeals has rejected the holdings of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and related cases, even though the court itself admitted this fact. *See* Pet. App. 26a-27a; *id.* at 33a ("traditional defamation analysis would have us consider the public or private nature of the speech . . . . We believe, however, that the novel facts here require a different approach").[1] In short, while respondents do not take issue with the question presented by petitioners, none of their arguments respond directly to that question.

In failing to address this Court's defamation precedents, respondents leave unchallenged the critical points that make this case worthy of further review:

- Respondents do not deny that the advertisements in question address a matter of public concern;
- Respondents do not deny that where speech addresses a matter of public concern, traditional First Amendment analysis requires a defamation plaintiff to prove actual malice if that plaintiff is a public figure. Respondents do not dispute that the corporate parties in this action have all the traditional attributes of limited purpose public figures.

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[1] Similarly, respondents argue that "the court of appeals did not . . . conclude that existing First Amendment doctrine is 'unsuited to this kind of case'" (Br. in Opp. 1). This statement cannot be taken seriously, given the court of appeals' explicit recognition that "in this case, however, *traditional defamation analysis is not well suited to strike the proper balance* between the state and federal interests and First Amendment values in the context of commercial speech." Pet. App. 45a (emphasis added).

- Thus, respondents do not challenge the view that had the court of appeals followed this Court's defamation rulings, as set forth in *Gertz* and its progeny, respondents would have been required to satisfy the actual malice standard.

- Finally, respondents do not seriously dispute that the court of appeals has announced a broad rule, rejecting the public figure test for all commercial advertising cases. Indeed, respondents interpret the opinion below as establishing a *per se* exception to the doctrine. *See* Br. in Opp. 9-10 n.1 (suggesting that a corporation cannot achieve public figure status through advertising).

Rather than confront the question presented, respondents simply ignore the defamation line of cases, and focus exclusively on commercial speech cases. For the most part, U.S. Healthcare's brief merely repeats the court of appeals' rationale, and therefore suffers the same weaknesses as those identified in the petition.[2] To the extent

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[2] For example, respondents adopt the court of appeals' conclusions (a) that commercial speech *generally* needs less protection because it is less likely to be "chilled," and (b) that granting greater protection to commercial speech will somehow "dilute" the protection given to political speech. Br. in Opp. 7-8. Interestingly, respondents do not address petitioners' argument on the first point; as noted in the petition, while advertising *generally* might not be chilled, companies will be (and indeed, already have been) chilled from providing any meaningful, comparative information in their advertisements. Instead, they will switch to the kind of uncontroversial advertisements that add nothing to the free flow of ideas. *See* Pet. 22.

Respondents' "dilution" argument is also untenable in this context. As Judge Kozinski and his co-author have written in their discussion of commercial and non-commercial speech:

> It is urged that protecting the two forms of speech identically will cause some sort of leveling process, which will inevitably drain some protection from noncommercial speech. It is difficult to understand why this should be so. The argument seems to assume that the total amount of first amendment protection available for judges to draw upon is constant, so that protecting

respondents' arguments go beyond the opinion below, they do nothing to undermine the need for review by this Court:

1. Respondents argue that this Court already has determined that even commercial speech that addresses a matter of public importance should receive less constitutional protection than non-commercial speech. *See* Br. in Opp. 10-11 (citing *Board of Trustees v. Fox*, 109 S. Ct. 3028 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980)). These cases, however, have little relevance to the question before the Court. Each of these cases (indeed, *all* of the decisions relied on by respondents) involved government regulation of speech. None of these decisions confronted a countervailing line of authority—such as the public figure doctrine—whose specific purpose is to protect speech on matters of public concern. The First Amendment interests that are protected by this Court's defamation cases simply were not present in the decisions cited by U.S. Healthcare.

2. Respondents make the related claim that if actual malice protection were available in this case, "too many" advertisements would receive this protection. *See* Br. in Opp. 11-12. As explained in the petition, however, most commercial advertisements cannot be construed as addressing matters of public concern. *See* Pet. 16. Even fewer discuss products such as the ones in this case, which are themselves at the heart of a public debate.[3]

> speech in one place will leave less protection for speech in another place where we might really need it.

Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 648 (1990) (footnote omitted).

[3] Respondents dispute this point by claiming, *inter alia*, that "tobacco, alcohol, drugs and automobile safety are 'themselves'

Respondents also attempt to justify the lower court's result with the untenable statement that "[p]etitioners clearly are able to comment directly about health care issues *without* simultaneously promoting their products, if they choose to do so." Br. in Opp. 12 n.3 (citation omitted, emphasis in original). It is far from clear how petitioners could publicly discuss the merits of Preferred Provider Organizations, or what they perceive to be the weaknesses of HMOs, without being accused (perhaps legitimately) of engaging in the promotion of their own product.[4] Thus, in this kind of case it simply is not true, under the court of appeals' decision, that petitioners "enjoy the full panoply of First Amendment protections for their direct comments on public issues." *See id.* at 12 (citing *Central Hudson*, 447 U.S. at 562 n.5).

The very examples that respondents cite in support of the decision below highlight the flaws of the lower court's opinion. Speech that is directed at a public figure and that discusses the health effects of cigarettes or drugs, or the environmental impact of products, unquestionably would be given full constitutional protection in a defamation action that did not involve commercial speech; the only distinguishing feature here is that the speakers had an overtly economic motive for making their statements. Respondents offer no support for the view that motive is a proper consideration in a defamation action, and they do not even attempt to justify the court of ap-

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matters of public concern . . . ." Br. in Opp. 12. This argument is far too broad; it seems likely that the vast majority of tobacco and alcohol advertisements, for example, only involve image enhancement and appeals to brand loyalty. Although the health risks associated with tobacco and alcohol products are a matter of public concern, "image" advertisements do not raise important public interests.

[4] Simply discussing HMOs generally, without referring to any particular HMO, is apparently insufficient to avoid the label of commercial speech. None of petitioners' advertisements in this case mentioned U.S. Healthcare by name.

peals' disregard of this Court's frequent admonitions against reliance on the speaker's motive in First Amendment cases. *See, e.g., Harte-Hanks Communications v. Connaughton*, 109 S. Ct. 2678, 2685 (1989). *See also* Pet. 15-16 (citing cases).

3. The petition observes that the opinion below is inconsistent with *Bigelow v. Virginia*, 421 U.S. 809 (1975), in which the Court ruled that commercial speech on issues of public concern should receive greater protection than other kinds of advertising. *See* Pet. 19-21. U.S. Healthcare responds that *Bigelow* is inapplicable, because in its view that case has been limited to "advertisements involving constitutionally protected activities such as abortions." Br. in Opp. 11 (citing *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 345-46 (1986)). Respondents then argue that because "the marketing of health insurance is clearly not a 'right' protected by the Constitution," *Bigelow* does not apply. Br. in Opp. 11.

This argument is based on a faulty premise. In *Posadas*, the Court simply concluded that because the legislature had the power to prohibit the *activity* that was being advertised (gambling), it also enjoyed the lesser power to prohibit the advertising of that activity. The Court distinguished *Bigelow* by noting that in that case, the underlying activity—abortion—could not be prohibited, and thus the advertising itself was constitutionally protected. *Posadas*, 478 U.S. at 345-46. No one, not even respondents, has suggested that the state in this case could prohibit the sale of all health care insurance. Respondents' reliance on *Posadas* as a basis for limiting or circumventing *Bigelow* is therefore misplaced.

4. Finally, respondents argue that the failure to create an exception to the public figure doctrine would be contrary to "the public interest." They complain that the actual malice standard makes it extremely difficult to punish offending speech, and that heightened constitu-

tional protection would be inconsistent with the Lanham Act. *See* Br. in Opp. at 12-13.

These arguments, of course, only address the merits of the court of appeals' decision, not whether the case presents a question worthy of review. And, in any event, the allegations of harm to the public interest are unjustified. It is true that the actual malice standard makes it more difficult to punish speech, but this is an *intended* effect, which itself serves the public interest by encouraging the dissemination of speech, and by encouraging public figures to respond to allegedly false speech with counter-speech, rather than litigation. Petitioners seriously doubt, and this Court has never held, that the "public interest" is best served by a rule that inhibits speech on matters of public concern.

Finally, even assuming for the sake of argument that the public figure doctrine imposes some limitation on the operation of the Lanham Act, this increases, rather than decreases, the need to grant the petition. The relationship between the First Amendment and an important federal statute is one that should be examined and defined by this Court.

Regardless of whether U.S. Healthcare's claims are under the Lanham Act or state tort law, the issue before this Court is the same. The case squarely presents the issue of the proper relationship between two developed First Amendment doctrines, the *Gertz* public figure doctrine and the commercial speech doctrine. This Court has never considered how these doctrines interact. This case provides a compelling opportunity to address that important issue.[5]

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[5] Respondents do not suggest that the procedural posture of this case poses an obstacle to immediate review. Nor could they, since this Court frequently has granted review in cases where the federal courts of appeals have remanded for further proceedings on the merits. Where the question presented has otherwise warranted this Court's attention, the Court has not hesitated to grant review even

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES A. YOUNG *
STRADLEY, RONON, STEVENS & YOUNG
2600 One Commerce Square
Philadelphia, PA 19103
(215) 564-8000
Attorney for Petitioner Pennsylvania Blue Shield

JAY H. CALVERT, JR.
J. GORDON COONEY, JR.
ANDREW D. LEIPOLD
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000

PETER BUSCEMI *
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Attorneys for Petitioners Independence Blue Cross and David S. Markson

July 5, 1990

* Counsel of Record

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in the face of such a remand. *See, e.g., Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428 (1989); *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Tower v. Glover*, 467 U.S. 914 (1984); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Paul v. Davis*, 424 U.S. 693 (1976).